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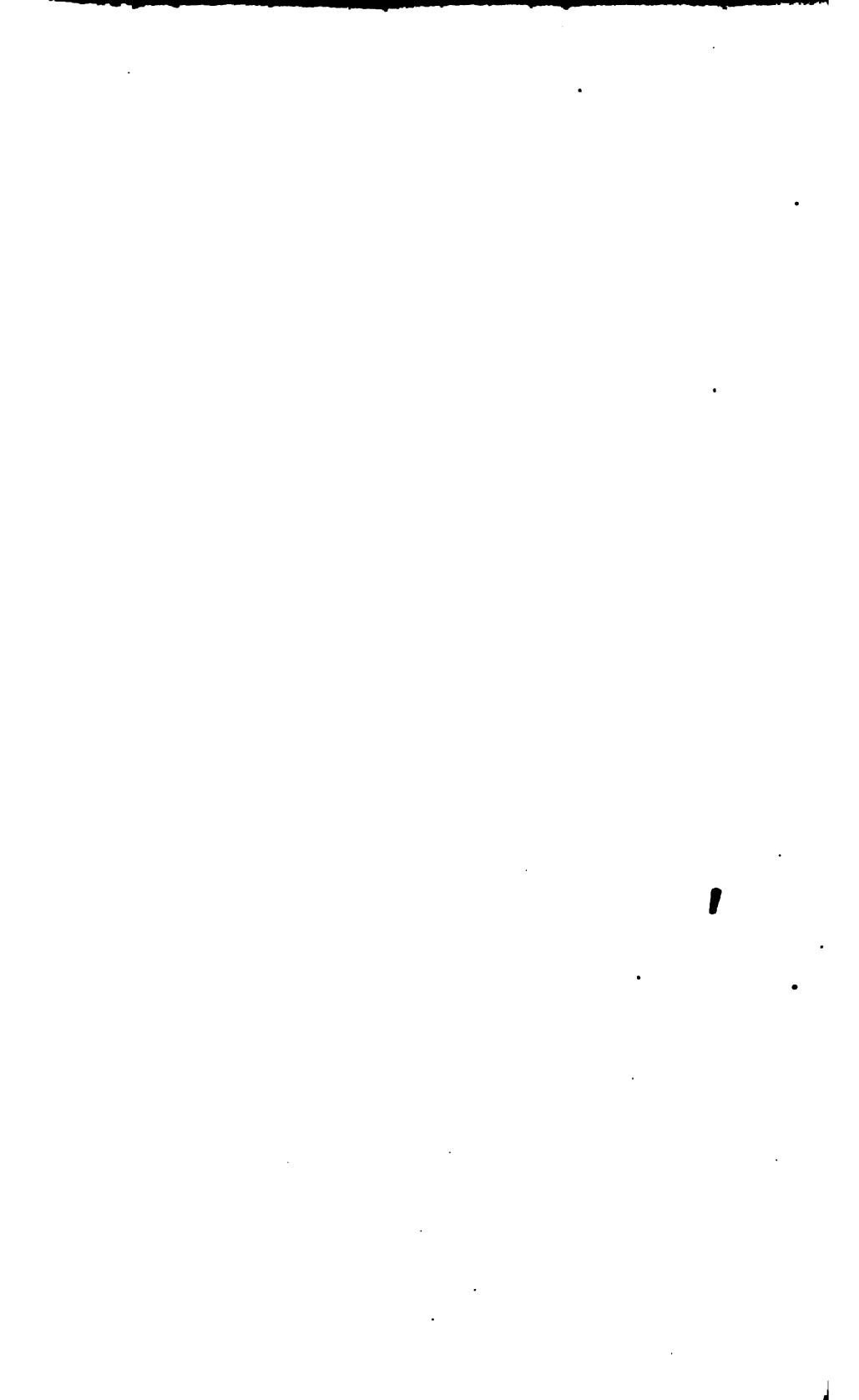
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AMERICAN AND ENGLISH
RAILROAD CASES.

A COLLECTION OF ALL

CASES AFFECTING RAILROADS OF EVERY KIND,
DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES, ENGLAND AND CANADA.

EDITED BY

THOMAS J. MICHIE.

VOLUME XVIII.

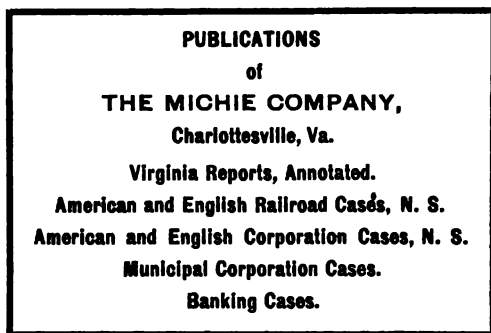
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THE
AMERICAN AND ENGLISH
RAILROAD CASES
(NEW SERIES.)

VOLUME XVIII.

LEWIS

v.

LONG ISLAND R. CO.

(*Court of Appeals of New York, Feb. 27, 1900.*)

Appeal—Review.—On appeal from a judgment of the appellate division, affirming a judgment of the trial court, the sufficiency of the evidence cannot be reviewed.

Accidents at Crossings—Sudden Emergency—Liability of Railroad for Employee's Error of Judgment.*—Where a railroad employee is confronted with a sudden emergency, such as the necessity of stopping the train to prevent a collision with a train at a crossing, the mere failure on his part to exercise the best judgment the case renders possible does not establish his lack of care and skill so as to make the railroad liable.

Same—Failure to Stop Not Negligence Per Se.†—A person approaching a railroad crossing, on foot or in a vehicle, is not required, as matter of law, to stop before attempting to cross the track, but his omission to do so is a fact for the consideration of the jury.

Same—Signboards—Actionable Negligence.‡—The omission of a railroad company to comply with the statute of New York requiring

*See *Bittner v. Crosstown St. Ry. Co.* (N. Y.), 9 Am. & Eng. R. Cas., N. S., 152, and *note*, 157. See generally 12 Am. & Eng. R. Cas., N. S., 335 *et seq.*, *notes*.

†*Ritzman v. Philadelphia & R. R. Co.* (Pa.), 12 Am. & Eng. R. Cas., N. S., 444, and *extensive note*, 444 *et seq.*

‡See *note* at end of case.

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signboards of a certain description to be maintained at crossings may constitute actionable negligence.

Same—Care Required of Traveler.*—A person approaching a railroad crossing is not bound to exercise the highest degree of care, but only such care as a prudent man would ordinarily exercise under the circumstances.

Whether Negligence of Driver Imputable to Traveler.†—Plaintiff, when injured, was riding in a vehicle furnished by a liveryman, under a contract to transport plaintiff and his associates; and neither plaintiff nor his associates hired, selected, nor had any control over the driver, except that of directing where a stoppage should be made for lunch. *Held*, that the negligence of the driver was not imputable to plaintiff, as their relations was not that of master and servant.

APPEAL by defendant from Second department appellate division supreme court. *Reversed*.

Benjamin F. Tracy and *William J. Kelley*, for appellant.
Albert A. Wray, for respondent.

MARTIN, J. The allowance of this appeal does not enable us to examine or determine whether there is any or sufficient evidence to sustain the verdict, inasmuch as the affirmance by the appellate division was unanimous. *Reed*

Appeal—Review. *v. McCord*, 160 N. Y. 330, 54 N. E. 737. Therefore the questions of the defendant's negligence and the plaintiff's freedom from contributory negligence cannot be reviewed by this court. The only questions that can be passed upon by us are those raised by the defendant's exceptions to rulings of the court upon the admission or rejection of evidence, and to its charge or refusals to charge as requested by the defendant. To a proper understanding of these exceptions, a brief statement of the facts seems necessary.

This action was for negligence. The plaintiff was injured in a collision which occurred at about 2 o'clock in the after-

*See generally *Louisville, N. A. & C. Ry. Co. v. Patchen* (Ill.), 10 Am. & Eng. R. Cas., N. S., 852, and *note*, 856; 12 Am. & Eng. R. Cas., N. S., 341 *et seq.*, *note*.

†See extensive *note*, 10 Am. & Eng. R. Cas., N. S., 837 *et seq.*

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noon of the 31st day of May, 1897, at a grade crossing of the Merrick road over the defendant's track. The plaintiff, with a number of associates, engaged a tallyho coach drawn by six horses to convey them from Brooklyn to Valley Stream and return, a distance of about 30 miles. The horses were gentle and the coach was in order. There were 21 persons upon and in it at the time of the accident. The trip was to be made in pursuance of a contract with one Hamilton, a liveryman, to transport the party the round trip for \$30; he to furnish the coach and teams, and send them in charge of a competent driver. The teams and coach were entirely under the control of Hamilton's employees, except that the plaintiff and his associates were perhaps authorized to determine where they would stop for lunch. The Merrick road, over which this excursion was to be made, is a smooth, macadamized highway to the extent of 18 feet in width, upon which there is a great amount of travel. The right of way is about 50 feet in width, and outside of the macadamized portion there are ditches and earth, which are overgrown with grass and weeds, except about 4 feet on each side next to the macadamized portion. At the place of the accident the crossing was planked, so that the spaces between the rails, the rails, and the macadamized road on each side of the track presented a smooth, even appearance; the top of the rails being even with the roadbed and planking. There was a signboard beyond the crossing, which was to some extent obscured by telegraph poles between it and the track. This board, instead of being maintained across the street as required by the statute, was placed upon a single post at the side of, and 6 feet from, the edge of the macadamized road. The words painted upon the signboard were not those required by the statute, nor were they of the size prescribed. Section 33 of the railroad law requires that such signboards shall be placed, well supported, and constantly maintained "across" each traveled public road or street, where the same is crossed by a railroad at grade; that they shall be so elevated as not to obstruct the travel and so as to be easily seen by travelers, and that

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on each side shall be painted in capital letters, each at least 9 inches in length and of suitable width, the words: "Railroad Crossing. Look Out for the Cars." The board which was erected at this place was upon a single post, to which three boards were fastened, one at right angles with the post; the other two extending from the ends of the first to and beyond the post, crossing each other thereon. Upon these boards were painted the words: "Danger, Railroad Crossing." On the side of the road, back of, and extending a considerable distance beyond, the signboard, were trees and underbrush from 25 to 30 feet high. The proof, while in conflict as to the distance this board could be seen by travelers, tended to show that it could be seen by one who knew of its existence for a considerable distance, while by a stranger who was not aware of its presence it would not be readily seen or noticed. There were no gates or flagman at this crossing. Upon one of the telegraph poles, standing near the signboard, there was an electric signal bell about 10 feet above the ground.

For some distance from the crossing and up to it there are trees, woods, and underbrush on both sides of the highway, which upon the left side extend to within 18 feet of the crossing, obscuring the view of the track from the highway. At a point in the center of the highway 34 feet from the track, it could be seen for nearly 211 feet from the crossing, and a clear and unobstructed view could be obtained $24\frac{1}{2}$ feet from the nearest rail. It was 70 feet from the rear of the coach to the heads of the leaders in the team. While previously there had been considerable jollity among the young people upon the coach, including the blowing of horns and the sounding of a bugle, at the time of the accident no unusual noise was being made, and the team was going slowly, some of the horses upon a walk, and the others upon a slow trot. The plaintiff was seated upon the top of the coach, where he could observe what came within the line of his vision. He had never been over the road before, and knew nothing of the location of the railroad or its crossings. As the coach

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approached the crossing he looked both ways, but saw nothing to indicate its presence or any approaching danger. The train came from the left of the highway, upon which side there were woods obscuring the plaintiff's view. The locomotive was not using steam, and the sound of the train was obstructed or interfered with by the woods. The track was wet from previous rain. A number of witnesses testified that they were in a position to have heard the sounding of the whistle or the ringing of the bell if it had been blown or rung, but that they did not hear either. Upon the other hand, the defendant's witnesses testified that the engine whistled a number of times at different stations and crossings within a few miles of the point where the accident occurred, and that it whistled a quarter of a mile away. They also testified that the engine bell was rung from that distance to the crossing. One of the defendant's employees, or, rather, a student fireman upon the engine, testified that the whistle was not blown until the train was within 400 feet of the crossing, and that the fireman was lazily ringing the bell for about 80 rods, but that it did not ring loudly, for the clapper just touched the sides with a slow motion. There was also proof that the automatic signal near the crossing could be heard for a distance of a quarter of a mile when it rang, but that it did not ring on the approach of this train. The train was moving 35 miles an hour, or at the rate of over 51 feet per second. The coach was going from 5 to 7 miles an hour, or from about 7 to 10 feet per second. As the coach approached, no one upon it discovered the crossing or the track until the horses were within about 10 feet of the rails. At that time the driver was within 50 feet of the track, the plaintiff 65 feet away, and their view of the approaching train was obstructed by the woods. No sound of its approach had been previously heard. At that time, however, one of the party, who stood upon the highest part of the coach, saw the train, cried out, "Here comes a train!" and immediately jumped from the side of the coach to the road. He struck the ground about 30 feet from the nearest rail.

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When the warning was shouted by the young man who jumped off, the leaders were over, the body team was just crossing, and the wheelers were upon the track. Upon discovering the situation, to save himself and his passengers, the driver seized his whip and lashed the team into a jump. The train was late, and did not slacken its speed until it struck the coach near the middle, demolishing it, throwing the passengers to the ground, and killing or maiming most of them. The plaintiff was thrown a distance of 124 feet, and landed upon a sand pile. He sustained a fracture of the shoulder blade, and various bruises and contusions upon his head and other portions of his body. The defendant's engineer testified that he could stop the train within 500 feet, but it was not stopped until it had passed the crossing, a distance of 775 feet. The team was across and the coach was nearly across the track when the collision occurred. The engineer of the defendant saw the horses as they came from behind the woods, but they passed over a distance of 24 feet after he saw them before he applied the brakes or undertook to stop the train. He used no sand upon the track, but reversed the engine, which locked the wheels so that they slid, and the train did not stop as soon as it otherwise would. The plaintiff's associates who made the contract for the team selected the coach to be furnished for this excursion, and it was decorated with bunting by them. The young men who hired this equipage took a number of young women with them. No particular place had been selected where their luncheon was to be eaten, and previous to the time of the accident they had been looking for a place.

Having thus briefly stated the facts, so far as necessary to a proper understanding of the questions involved, we are brought to the consideration of some of the exceptions taken upon the trial. While we have examined them all, we find but few that require special consideration.

The first and only serious question raised by the exceptions of the defendant relates to the charge of the learned trial judge. At the conclusion of the principal charge the plain-

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tiff requested the court to charge as follows: "If you find that the engineer of the defendant's train, after seeing the horses attached to the tallyho in which plaintiff was seated, omitted to do any act which might have prevented the collision, or might have lessened the danger to plaintiff, defendant was guilty of negligence." The court so charged, and the defendant excepted. The appellant now urges that this was error, for which the judgment should be reversed. The engineer upon the defendant's train first saw the leaders of the team attached to the tallyho when the train was about 400 feet from the crossing. It was then running at the rate of 35 miles an hour, and he did not attempt to stop it until he saw the team coming upon the track, when he applied the emergency brake and reversed the engine. At the rate of speed which the train was running, only about eight seconds elapsed after he first saw the horses when the collision occurred. Thus, he was suddenly confronted with an emergency, having but a few seconds in which to take such precautions as were possible to prevent the accident or mitigate the injury. The acts necessary to stop the train were described upon the trial, and the engineer testified as to what was done. The effect of this charge was to instruct the jury that, if the engineer omitted any one thing which might have prevented the collision or lessened the danger, the defendant was guilty of negligence. This, in effect was an instruction that, if it should find that any such act was omitted, then, as a matter of law, the defendant was negligent. This may have presented to the minds of the jury the situation as it existed under the proof and subsequent to the time of the accident. The jury could properly consider only the situation as it was found to have existed when the accident occurred, and in the light of all the facts and circumstances which surrounded the engineer at that time. No one fact or circumstance could be considered by it independently of the others which related to it. It is often the case that after a transaction has occurred the most careful can discover that a different course of action might have prevented a

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calamity, or at least mitigated the injury. Still, when an emergency presents itself, and a person is under great excitement from the presence of an impending peril, he may not act with that perfect judgment that he would under other and different circumstances, and still not be negligent. "Railways are not liable for a mistaken exercise of judgment upon the part of their servants * * * to act with the utmost possible promptitude when the circumstances are such as to afford no time for deliberation." Patt. Ry. Acc. Law, p. 111. Where an employee of a railroad company is confronted with

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Crossings—
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a sudden emergency, the failure on his part to exercise the best judgment the case renders possible does not establish lack of care and skill upon his part, which renders the company liable. *Wynn v. Railroad Co.*, 133 N. Y. 575, 30 N. E. 721. It is not responsible even for his error of judgment. *Bittner v. Railway Co.*, 153 N. Y. 76, 46 N. E. 1044; *Stabenau v. Railroad Co.*, 155 N. Y. 511, 50 N. E. 277. The charge was in direct conflict with the principle of these authorities. Under the instruction given, the jury may have understood that negligence on the part of the defendant might be based upon the omission of the engineer to do any act which it at the time of the trial believed would have prevented the collision or lessened the injury, thus practically ignoring the situation at the time of the accident. The short period of time in which he was obliged to act; the impending danger to his train, to himself, to his passengers, and to others with the consequent excitement attending such a situation; the various acts required to stop or lessen the speed of the train; and all the other circumstances surrounding him at the time,—should have been presented to the jury and considered by it before it could properly find the defendant negligent by reason of the acts of its engineer. By the portion of the charge under consideration the jury was permitted to find the defendant negligent without regard to these facts and circumstances, and to hold it liable for any mis-

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taken exercise of judgment upon the part of the engineer. This charge cannot be upheld without disregarding many of the principles of the law of negligence which are thoroughly established by the decisions of this court. It was clearly erroneous, and requires a reversal of the judgment from which this appeal is taken.

We might well leave the other questions in this case until the necessity for their determination shall be subsequently presented except for the fact that there are many cases pending where the same questions are involved, one of which is of quite general importance, and was the basis upon which this appeal was allowed.

On the trial the defendant requested the court to charge: "It is negligence, as matter of law, to drive onto a steam-railroad track, where the view is obstructed, without stopping, looking, and listening. The Court: I will not charge it in those words. Mr. Kelly: I except to your honor's refusal to charge as requested. The Court: I will charge as follows: It is negligence, as matter of law, to drive onto a steam-railroad track, where the view is obstructed, without looking and listening. Mr. Kelly: I except to your honor's refusal to charge as requested. The Court: I would say further that whether it is the duty of the traveler to stop depends upon the circumstances of the case, the surrounding conditions, and the nature of the vehicle which he is using. I do not say, as matter of law, it is his duty to stop every time. I say there might be conditions under which he ought to stop, in the exercise of ordinary care. Whether it was the duty of the plaintiff here to have stopped is for the jury to say, under all the circumstances surrounding this case, considering the condition of the crossing, the obstructions, if any, its situation and the surroundings, and the nature of the vehicle which was being used by him. Gen. Tracy: And the defendants excepts to your honor's charge to that effect." We find no error in this charge, and think the defendant's exceptions were not well taken. This question has been

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recently before us, and it was held that a person approaching a railroad crossing is not required, as a matter of law, to stop before attempting to cross the track, but his omission to do so is a fact for the consideration of the jury. *Judson v. Railroad Co.*, 158 N. Y. 597, 53 N. E. 514.

Same—Failure to
Stop Not Negli-
gence Per Se.

The defendant likewise asked the court to charge that “no negligence can be imputed to the defendant by reason of the size or shape of the danger signal, or the language of the warning, or the length of the letters.” This the court declined to charge, and the defendant excepted. It is obvious that by this request it sought an instruction to the effect that a disregard of the statute by it as to signboards across streets or highways at its crossings could not be made a basis of negligence. As we have already seen, the statute requires every railroad corporation to cause boards to be placed, supported, and maintained across each public road or street, where the same is crossed by a railroad at grade. It also describes in detail their height, the manner in which they shall be constructed and maintained, the words which shall be painted thereon, the character of the letters employed, and their length and width. That the sign erected at the crossing where this accident occurred did not comply with the statute, there is no doubt. It is equally clear that the one prescribed by the statute would be more readily seen, and would more effectually notify an approaching traveler of the existence or situation of the railroad than the one used. While the omission to comply with the statute in this respect might not constitute actionable negligence, where a person was injured, who was familiar with the crossing, and had it in mind at the time, as in such a case the omission would not contribute to his injury, still, where one is injured who is not familiar with the crossing, but is a stranger wholly ignorant of its existence or of the presence of any signboard, such an omission might constitute negligence which would justify a recovery. Although this precise question has not, to our knowledge, been passed upon

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by this court, yet in discussing a somewhat similar question in *Palmer v. Railroad Co.*, 112 N. Y. 234, 244, 19 N. E. 678, 681, JUDGE DANFORTH said, "I do not think the court can say, as matter of law, that the statutes which require signals and precautions can be disregarded by the defendant, and it be allowed to claim that the traveler should not be influenced by these omissions." Again he says, "Effect must be given to these wise regulations concerning measures to be adopted by a railroad company for the safety of the traveler." We think the same principle should be applied to the omission of a railroad company to comply with the statute requiring signboards at railroad crossings, where no such precaution is taken, or where it is obvious that the precaution provided by the company is less efficient than that required by the statute. We are of the opinion that proof of the omission of a railroad company to comply with this statute is admissible upon the question, and may constitute actionable negligence and justify a recovery where the injury was caused by a disregard of it. This conclusion is sustained by several text writers, and by decisions in other jurisdictions where the question has arisen. Thomas, Neg. p. 409; Patt. Ry. Acc. Law, p. 162; *Shaber v. Railway Co.*, 28 Minn. 103, 9 N. W. 575; *Railroad Co. v. Whitacre*, 35 Ohio St. 627; *Elkins v. Railroad Co.*, 115 Mass. 190, 201; *Winstanley v. Railway Co.*, 72 Wis. 375, 380, 39 N. W. 856; *Heddles v. Railway Co.*, 77 Wis. 228, 232, 46 N. W. 115; *Haas v. Railroad Co.*, 47 Mich. 401, 11 N. W. 216. It follows that the court properly refused to charge upon this subject as requested by the defendant.

Same—Sign-
boards—Action-
able Negligence.

The defendant also took the following exception to the main charge: "I except to your honor's statement of the obligation on the part of the traveler, where you say to the jury that a traveler is bound to exercise ordinary care to avoid the happening of an accident at a steam-railroad crossing. I except to that, and ask your honor to charge the jury that a traveler is bound to use extraordinary care to avoid accidents at

Same—Care
Required of
Traveler.

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a steam railroad crossing, and to use all his faculties to determine whether a train is approaching, and to avoid it." The court declined to so charge, because of the use of the word "extraordinary," and said that aside from that it charged as requested. "Mr. Kelly: Your honor charges that it was the duty of the traveler to exercise all his faculties to avoid danger? The Court: Yes; I have done that already. Gen. Tracy: We except to the refusal of your honor to charge as requested, including the use of the word 'extraordinary.' " We find no error in this ruling. The degree of care which a traveler must observe in approaching a railroad crossing has been recently under consideration by this court, and it was there held that a person approaching such a crossing is not bound to exercise the greatest diligence, but only such as a prudent man approaching such a place would ordinarily exercise under the circumstances. *Judson v. Railroad Co.*, 158 N. Y. 597, 53 N. E. 514.

The only other question that need be specially considered arises upon the defendant's exception to the refusal of the court to charge that the relation of master and servant existed between the plaintiff and his associates and the driver and helper, that the former were responsible for their competency, and that their negligence, if there was any, was imputable to the plaintiff and his associates. In order to establish the liability of one person for an injury caused by the negligence of another, it is not enough to show that the latter was at the time acting under an employment by the former; it must be shown, in addition, that the employment created the relation of master and servant. *Hexamer v. Webb*, 101 N. Y. 377, 4 N. E. 755; *King v. Railroad Co.*, 66 N. Y. 184; *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. 1017. In the latter case JUDGE FINCH said that the relation of master and servant exists where the employer selects the workman, may remove or discharge him for misconduct, and may not only order what work shall be done, but the manner and mode of performance. The plaintiff in the case at bar did not hire

Whether Negligence of Driver Imputable to Traveler.

Note

or pay the driver or attendant, and had no voice in the selection of either, which was an important element in determining the relation between them. The fact that the driver may have received from the plaintiff or his associates orders when to go forward and stop did not make the plaintiff the servant of the defendant. *Johnson v. Navigation Co.*, 132 N. Y. 576, 30 N. E. 505. No further discussion of the question is necessary at this time, as we have recently had this subject under consideration. *Murray v. Dwight*, 161 N. Y. 301, 55 N. E. 901. It is manifest that under the principles established by the decisions of this court the relation of master and servant did not exist between the plaintiff and the driver or helper, or either of them.

After carefully and studiously examining the great number of perplexing and difficult questions determined during the heat and excitement of a sharp and protracted trial, we can but admire and commend the scrupulous and intelligent care and ability evinced by the trial judge, and the almost unerring correctness of his rulings. When the number and variety of the questions raised are considered, we are surprised, not that a single error was committed, but that there were not many more. The judgment and order should be reversed, and a new trial ordered, with costs to abide the event.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, and VANN, JJ., concurred.

Judgment and order reversed, etc.

NOTE.

Liability of Railroad for Failure to Erect Signboard at Highway Crossing.—The failure to erect a caution board at a railroad crossing as required by statute does not necessarily make the railroad liable for damages caused by a collision with one of its trains at the crossing. *Haas v. Grand Rapids, etc.*, R. R. Co., 8 Am. & Eng. R. Cas. 268, 47 Mich. 401; *Field v. Chicago, etc.*, Ry. Co. 4 McCreary (C. C.) 373, 8 Am. & Eng. R. Cas. 425, 14 Fed. Rep. 332.

The liability of a railroad company for death or personal injuries

Note

caused by its neglect to put up at highway crossings the signboard to warn travelers along the highway of danger from the proximity of the railroad train, does not attach absolutely under the statute where it appears the damages sustained were the result of the injured party's own negligence, and were not caused by the absence of the signboard. The intention of the statute was not to create an absolute liability on the part of the railroad company, but to make the failure to provide signboards, at highway crossings, conclusive evidence of negligence on the part of the company. *Field v. Chicago, etc., R. R. Co.*, 4 McCreary C. C.), 373, 8 Am. & Eng. R. Cas. 425, 14 Fed. Rep. 332.

So, in *Lang v. Haliday, etc., R. R. Co.*, 49 Iowa 469, it was held that the failure to erect a sign at a crossing renders railway companies liable only for damages sustained by the neglect or refusal to erect the signs, and does not release a party seeking to recover from the necessity of establishing due care in the premises. See also *Field v. Chicago, etc., R. R. Co.*, 4 McCreary (C. C.), 373, 8 Am. & Eng. R. Cas. 425, 14 Fed. Rep. 332.

Where, in an action by a traveler on a public highway, against a railroad company, to recover for injuries received from a collision with a passing train at a public crossing, alleged to have been caused by negligence in the management of the train, the evidence tends to show that he did not exercise proper care and caution to avoid the injury, it is competent for him to show that there was no signboard up, as is required by law, as reflecting upon the question of his want of care, although the want of such signboard is not alleged as a ground of recovery. *Baltimore & O. R. R. Co. v. Whitacre*, 35 Ohio St. 627.

Evidence that the company had no sign over the crossing to warn persons approaching of its presence, is proper, although there be no statute or ordinance requiring the company to have such a sign. It is for the jury to say whether the omission to have such a sign is negligence; and it is for them to say whether it contributed to the injury, even where it appears that the person injured was familiar with the crossing. *Shaber v. St. Paul, etc., R. R. Co.*, 28 Minn. 103, 2 Am. & Eng. R. Cas. 185. And in an action against a railroad company for injuries sustained by being run into at a place where a highway crosses the railroad, evidence that there was no signboard at the crossing at the time of the accident is admissible, on the issue of due care on the part of the plaintiff. *Elkins v. Boston & A. R. R. Co.*, 115 Mass. 190.

The statutory precautions of sub-section 3 of sec. 1166 of the Code as to signal boards and signals have no application where a person is injured while traveling along a public road near to and parallel

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with the railroad. *East Tenn., Va. & Ga. R. R. Co. v. Feathers*, 10 *Lea* (Tenn.) 103, 15 *Am. & Eng. R. Cas.* 446.

The caution board is for the purpose of a notification to those who are passing along the road; and where a party is familiar with the crossing, and has frequently been over it, and had it in mind on the occasion in question as he approached it, he cannot be said to have been injured by the failure to set up the caution. *Haas v. Grand Rapids, etc., R. R. Co.*, 47 *Mich. Rep.* 401, 8 *Am. & Eng. R. Cas.* 268.

The omission of a railway company to place a sign at the point where it crosses a public road will not render the company liable for injuries inflicted on one traveling the road at the crossing who knew, or might have known by the exercise of ordinary care, of the crossing place in time to have avoided injury from a passing train. *Gulf, Colorado & Santa Fe R. R. Co. v. Greenlee et ux.*, 62 *Tex. Rep.* 344, 23 *Am. & Eng. R. Cas.* 322.

The duty of a railroad to erect signboards at crossings is a duty to the public; and no private action can be grounded upon a failure to perform such duty unless individual injury can be traced to such failure. *Pakalinsky v. N. Y. Central, etc., R. R. Co.*, 82 *N. Y.* 424; *Haas v. Grand Rapids, etc., R. R. Co.*, 8 *Am. & Eng. R. Cas.* 268.

GILBERT

v.

ERIE R. Co.

(*Circuit Court of Appeals, Sixth Circuit, Nov. 13, 1899.*)

Accident at Crossing—Negligence and Contributory Negligence.*

—The petition alleged, in substance, that deceased was approaching the track of the defendant company in a covered buggy; that he had a full view of the track, and that he saw the train at a distance of from 2,600 to 3,000 feet, rapidly nearing the crossing; that this discovery was made when he was 135 feet from the track; that he proceeded to approach, and attempted to cross the track without looking in the direction from which the train was approaching; that he reached the track in not more than 24 seconds from the time he saw the train; that during this time the train was in full view; that there was nothing to prevent him from checking or stopping

*See *Crawford v. Chicago C. W. Ry. Co.* (Iowa), 16 *Am. & Eng. R. Cas.*, N. S., 628, and *note*, 631.

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his horse in time to avoid the injury ; that he did not do so, but, looking away from the train, drove upon the track and was killed by the train ; and that there was negligence on the part of the company in failing to give crossing signals, and in running the train at an excessive rate of speed. *Held*, that a demurrer to the petition was properly sustained ; as such contributory negligence will bar recovery, notwithstanding such negligence on the part of the railroad.

Rule Permitting Recovery Notwithstanding Contributory Negligence.*—The rule rendering defendant liable where plaintiff, by his own negligence, has placed himself in a dangerous position, and defendant, when chargeable with notice of plaintiff's danger, failed to use reasonable care to avoid injuring him, and but for such failure the injury would have been avoided, does not apply to a case where it clearly appears that the injury was the result of the concurrent negligence of plaintiff and defendant.

ERROR by plaintiff to the circuit court of the United States for the Eastern division of the Northern district of Ohio.
Affirmed.

O. C. Pinney, for plaintiff in error.

Before LURTON and DAY, Circuit Judges, and THOMPSON, District Judge.

DAY, Circuit Judge. This case was decided in the court below on demurrer to the petition, and the sole question presented for determination here is, did the court err in sustaining the demurrer? The petition, omitting formal parts, is as follows :

"Plaintiff says : That she is the duly appointed, qualified, and acting administrator of the estate of Calvin Gilbert, now deceased. That the defendant is a corporation, operating railroads within the state of Ohio, and was so doing at all the times herein mentioned, and among which was a railroad running from Cleveland, Ohio, southeasterly, and passing through the village of Solon, about twenty miles from Cleveland, and containing about six or seven hundred inhabitants. That said Calvin Gilbert, when in full life, and on or about the 3d day of November, 1897, was residing in said village of

*See 12 Am. & Eng. R. Cas., N. S., 332 *et seq.* 332.

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Solon, on the first street crossing the tracks of the said defendant southeasterly from its depot. That he resided on the westerly side of said street, and southerly side of said railroad track, and only a short distance therefrom. That on or about the 3d day of November, at one o'clock p. m., said Calvin Gilbert, riding in a covered buggy, with the side curtains on, passed out of his yard, driving a horse, turned northerly to cross said track. That when not more than 135 feet from said track, and while looking out of his buggy southeasterly, saw the train approaching, operated by said defendant, its officers, agents, and servants, at which time said train blew a long whistle, and was between 2,600 and 3,000 feet in a southeasterly direction from said crossing, and was coming in the direction of said crossing. That said Calvin Gilbert then continued to approach said crossing at a rate of six miles an hour, and, as he approached, looked in a northwesterly direction, along the tracks of said company, to discover if any trains were coming from that direction. That said defendant, at the time, maintained two tracks at said crossing. That about 600 feet easterly from the crossing on which said Gilbert was driving was another parallel crossing, which said train had to pass before reaching the crossing of said street on which said Gilbert was driving. That said Gilbert proceeded to approach and cross said tracks, and did not again look in the direction from which said train was coming, and had only time to observe as to whether any train was coming from the other direction, and reached said track on which said train was coming in not more than twenty-four seconds from the time that he saw the said train. The agents and servants of said defendant, in operating said train, did not blow any whistle for the crossing six hundred feet easterly from the crossing on which said Gilbert was driving, and did not blow any whistle for the crossing on which said Gilbert was driving; neither did said agents and servants cause any bell to ring from the time that they sounded said whistle, 3,000 feet away, until the time it hit the buggy in which

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said Gilbert was driving, as herein described. That it was the duty of said agents and servants operating said train to cause a distinct and sharp whistle to be blown before crossing either of said streets, and said Calvin Gilbert could have distinctly heard either of the same had it been blown, and would have been warned by said whistles, and escaped injury. Said Calvin Gilbert lived at said place ever since said railroad was constructed, and had crossed the same a great many times, and was familiar with the speed at which the train of said railroad company ran when passing upon said track in the vicinity of said crossing. That the ordinary and usual rate of speed at which said train ran would have required forty-five or fifty seconds in which to reach said crossing, and all of which said Calvin Gilbert knew, and which he believed it would require this train to occupy before said crossing was reached. Said Calvin Gilbert, not hearing any of said whistles, was therefore unaware of the rapid approach of said train, which was at the time going at reckless rate of speed of more than ninety miles an hour. That said train was the fastest train upon said track, as per the time table issued by said defendant, and on said day was behind time, and had aboard some of the executive officers of said defendant, and was running at a terrible rate, and much faster than it had ever run when passing along said track in this vicinity. That, at the time said train approached this crossing, the engineer did not see the approach of Calvin Gilbert, and neither did the fireman on the engine of said train see him, and it was the duty of both to have seen him, and to have done all that could be done to avoid any accident. Said Calvin Gilbert was at all times after said whistle in full view of said engineer and fireman, and had he been seen by either, and had they exercised reasonable care in the management of the train after seeing him, said accident could have been avoided. The said defendant was not at said time maintaining any watchman at said crossing, which is in a thickly settled part of Solon, and where teams frequently cross, and it was the duty of

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said defendant to have maintained a watchman at said crossing. Plaintiff says that, as the buggy of said Calvin Gilbert was upon the track upon which said train was coming, said train came into collision therewith, and struck said Calvin Gilbert, and caused his death. Plaintiff says that she is a widow and only heir of said Calvin Gilbert, and brings this action on behalf of herself as such heir and in her capacity as such administrator. Plaintiff says that the death of said Calvin Gilbert was caused by the negligent, careless, and reckless manner in which the agents and servants of said defendant managed its train, and by the failure of said defendant to maintain a watchman at said crossing, and was not caused by the carelessness or negligence of said Calvin Gilbert that in any way contributed to his death. That by reason of the premises she has been damaged in the sum of \$10,000, for which she asks judgment against said defendant."

From the opinion of the learned judge who heard the case in the circuit court, it is apparent that it was decided, and the demurrer sustained, upon the theory that the statements of the petition show the deceased, Calvin Gilbert, to have been guilty of contributory negligence, and as a consequence there can be no recovery from the resulting injury or death.

The duty of one driving upon a public highway, and approaching a railway crossing, has been the subject of adjudication in the supreme court of the United States in a number of cases. In *Railroad Co. v. Houston*, 95 U. S. 697, MR. JUSTICE FIELD, delivering the opinion of the court, says:

"If the position most advantageous for the plaintiff be assumed as correct, that the train was moving at an unusual rate of speed, its bell not rung, and its whistle not sounded, it is still difficult to see on what ground the accident can be attributed solely to the 'negligence, unskillfulness, or criminal intent' of the defendant's engineer. Had the train been moving at an ordinary rate of speed, it would have been impossible for him to stop the engine when within four feet of the deceased. And she was at the time on a private right

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of way of the company, where she had no right to be. But, aside from this fact, the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed to both hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind. If one chooses in such a position to take risks, he must bear the possible consequences of failure. Upon the facts disclosed by the undisputed evidence in the case, we cannot see any ground for a recovery by the plaintiff."

In *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, the facts are somewhat analogous to those set up in the petition in the present case. MR. JUSTICE BLATCHFORD, in speaking for the court, on page 617, 114 U. S., and page 1126, 5 Sup. Ct., says:

"The ground upon which the circuit court directed a verdict for the defendant (2 McCrary 268, 8 Fed. 488) was that the plaintiff, by his own showing, was guilty of contributory negligence, whatever negligence there may have been on the part of the defendant. Applying the test that if it would be the duty of the court, on the plaintiff's evidence, to set aside, as contrary to the evidence, a verdict for the plaintiff, if given, the court had authority to direct a verdict for the

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defendant, it considered the case under the rules laid down in *Improvement Co. v. Stead*, 95 U. S. 161, and especially in *Railroad Co. v. Houston*, *Id.* 697, and arrived at the conclusion of law that neither the fact that the train was not a regular one, nor the fact of its high rate of speed, excused the plaintiff from the duty of looking out for a train; that the fact that it did not stop at the depot could avail the plaintiff only on the view that, hearing a whistle from it, as it was south of the depot, he supposed it would stop there, and so failed to look; but that, in such case, he would have been negligent, because it was not certain the train would stop at the depot, and he would have had warning that the train was approaching; and that the neglect of the train to blow a whistle or ring a bell between the depot and the crossing did not relieve the plaintiff from the duty of looking back, at least as far as the depot, before going on the track; and that in view of the duty incumbent on the plaintiff to look for a coming train before going so near to the track as to be unable to prevent a collision, and of the fact that he was at least 100 feet from the crossing when the train passed the depot, and could then have seen it if he had looked, and have avoided the accident by stopping until it had passed by, he was negligent in not looking."

In a very late case (*Railroad Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763) the same doctrine is applied, and again enforced.

The principle settled in these cases is that the failure on the part of the railway company to give signals, when approaching a highway crossing, although the train may be moving at an unusual rate of speed and the company be guilty of negligence in the running and management thereof, does not absolve the traveler from the duty of listening and looking before attempting to cross such railroad track, in order to avoid the approaching train. In such cases, if the traveler uses his senses, and the view of the approaching train is unobstructed, he cannot fail to be aware of its approach.

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If, failing to exercise this care, the traveler thoughtlessly drives upon the track without seeing the approaching train, he so far contributes to his injury as to deprive him of the right of recovery. If, using the senses of sight and hearing, the traveler sees the train approaching, and yet attempts to cross the track, instead of waiting for the train to pass, or taking proper precautions to preserve his safety, the consequences of such negligence cannot be charged to the railroad company. From the facts in the present case, as stated in the petition, it appears that the deceased was approaching the track of the defendant company in a covered buggy; that he had a full view of the track in a southeasterly direction, and that he saw the approaching train at a distance of from 2,600 to 3,000 feet, rapidly nearing the crossing; that this discovery was made by the decedent when he was 135 feet from the track; that he proceeded to approach, and attempted to cross the track without looking in the direction from which the train was coming; that he reached the track in not more than 24 seconds from the time he saw the train. During this time the train was in full view. There was nothing to prevent decedent from checking or stopping his horse in time to avoid the injury. He did not see fit to do so, but, looking away from the train, he drove in his covered buggy upon the track and was killed. The statement in the petition is that he did not look at the train after his first discovery of its approach. In thus experimenting upon the chances of crossing in safety, we think the decedent was guilty of negligence; and, admitting the allegations of the petition as to the negligence of the company, it still appears that the negligence of the decedent, continuing up to the time of the injury, directly contributed thereto, and consequently prevents a recovery in this case.

It further appears that a cause of action is sought to be made under the rule, recognized in a number of cases, which permits a recovery where, notwithstanding the negligence of the plaintiff, there was negligence on the part of the company, after it became aware of the negligence of the plaintiff, in

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failing to exercise reasonable care to avoid the consequences of the plaintiff's neglect. This rule was applied in this court in the late case of *Railroad Co. v. Hellenthal*, 60 U. S. App. 156, 31 C. C. A. 414, and 88 Fed. 116. JUDGE CLARK, in delivering the opinion of the court, uses this language :

"There is, however, a qualification of this general rule as thus stated, as fully established by decisions of the highest authority as the rule itself. This qualification is expressed in the proposition that, if it be shown that the defendant, after becoming aware of the plaintiff's negligence, might, by the exercise of reasonable care and prudence, have avoided the effect of the plaintiff's negligence or trespass, the defendant is liable for the injury. The qualification of the rule is thus stated in *Railway Co. v. Ives*, 144 U. S. 408, 429, 12 Sup. Ct. 687: 'Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification, which has grown up in recent years (having been first enunciated in *Davies v. Mann*, 10 Mees. & W. 546), that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence.'"

This rule, as applied in the supreme court of the United States in cases of contributory negligence, has had reference to cases where the defendant, after knowledge of the dangerous position in which the negligence of the plaintiff has placed himself, might, by the exercise of reasonable care, have avoided the consequences of the injured party's negligence. In such cases recovery has been permitted. *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653.

Shearman & Redfield, in their work on Negligence (5th Ed. § 99), state the doctrine as follows :

"It is now perfectly well settled that the plaintiff may re-

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cover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was more immediately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him. We know of no court of last resort in which this rule is any longer disputed, although the same rule, in substance, but inaccurately stated, has been made the subject of strenuous controversy. But, furthermore, the plaintiff should recover, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was more immediately caused by the omission of the defendant, after having such notice of the plaintiff's danger as would put a prudent man upon his guard, to use ordinary care for the purpose of avoiding such injury. It is not necessary that the defendant should actually know of the danger to which the plaintiff is exposed. It is enough if, having sufficient notice to put a prudent man on the alert, he does not take such precautions as a prudent man would take under similar notice. This rule is almost universally accepted. The most reckless persistence, on the part of one exposed to danger, will not justify another in consciously refraining from using care to avoid injury to him. This qualification of the doctrine of contributory negligence, often called the 'rule in *Davies v. Mann*,' from the leading case on this subject, has been much criticised. But those criticisms turn mainly upon the language used by Baron Parke in that case, which is, perhaps, too broad, and which has not been here adopted, although it has been literally repeated in the highest court of England as well as in that of the United States. It is possible, too, that the application of the principle in *Davies v. Mann* was erroneous, but that does not affect the validity of the principle which lay at the foundation of the case. That principle is that the party who has the last opportunity of avoiding accident is not excused by the negligence of any one else. His negli-

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gence, and not that of the one first in fault, is the sole proximate cause of the injury."

As we understand the rule to be deduced from these authorities, it amounts to this: That where the plaintiff, by his own negligence, has placed himself in a dangerous position, where injury is likely to result, the defendant, with knowledge, or such notice as is equivalent thereto, of the plaintiff's danger, is bound to use reasonable care and diligence to

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Contributory
Negligence.

avoid injuring the plaintiff; and where, by the exercise of such care he could do so, fails to avoid the injury, this negligence introduces a new element into the case, and renders the defendant liable, because such negligence becomes the direct and proximate cause of the injury. We do not think the principle settled in these cases applies to a case where it clearly appears that the injury is the result of the concurrent negligence of the plaintiff and defendant. There is no averment in the petition that the engineer or fireman saw the decedent upon the track, or in a place of imminent danger, in time to have avoided the injury. Taking the allegations of the petition together, it seems to us to be a case of concurrent negligence on the part of the decedent and the railway company. Assuming it to be true that the defendant was guilty of the negligence charged in the petition, the deceased was guilty of negligence which directly contributed to the injury. In this view of the case, we do not think it is brought within the principle laid down in *Railroad Co. v. Hellenthal*, above cited, and similar cases. As the petition fails to disclose a cause of action in favor of the plaintiff, the demurrer was properly sustained, and the judgment of the court below is affirmed.

Central of Georgia Ry. Co. v. Hall

CENTRAL OF GEORGIA RY. CO.

v.

HALL.

(Supreme Court of Georgia, Dec. 1, 1899.)

Dispersal of Jury—Discretion of Court.—It is within the discretion of the trial judge on the trial of a civil case to allow the jury to disperse at dinner and at night, while the evidence is being submitted, and before they retire to make up their verdict, without the consent of the parties to the case; no motion being made *contra*, or cause showing for not allowing the separation.

Crossings—Duty to Check Speed.—In the trial of an action against a railroad company for injuries done to property at a public crossing which was half a mile from the depot where the train started, it was not error to give in charge to the jury "the crossing law," as contained in sections 2222 and 2224 of the Civil Code.

Excessive Verdict.—The verdict, as written off under the order of the court, is not so excessive as to require a new trial.

(Syllabus by the Court.)

ERROR by defendant from Sumter county superior court.
Affirmed.

J. B. Hudson and William D. Kiddoo, for plaintiff in error.

L. J. Blalock, W. P. Wallis, and J. A. Hixon, for defendant in error.

SIMMONS, C. J. At a point some half mile below the depot in the city of Americus, Hall's team and wagon, which was loaded with one ton of guano, was run over by one of defendant's engines at a public crossing within the city limits. The wagon was destroyed, one of the mules rendered entirely useless for service, and the other one was so badly injured that he was of very little use thereafter. The ton of guano was practically scattered to the winds, very little of it being saved. The evidence is clear that the servants of the company did not observe the "crossing law" contained in sections 2222 and 2224 of the

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Civil Code, so far as the checking of the speed of the train was concerned. There is a conflict in the testimony as to whether the bell was rung or not. Hall brought his action to recover damages for the injury which he alleged he sustained on account of the negligence of the servants of the railroad company. Upon the trial of the case, before the testimony was concluded, the judge allowed the jury to disperse for the purpose of procuring their dinners, and also at night, to allow them to return to their homes. This was done, as the motion for new trial alleges, over the protest of counsel for the defendant at the dinner hour, and without his consent when they were allowed to disperse at night. The trial resulted in a verdict for \$400 for the plaintiff, and a motion for a new trial was made, which was overruled, and the defendant excepted.

1. The motion complains that the judge allowed the jury to disperse, over the protest of counsel, and without his consent. When this case was being argued on these two grounds, it was admitted that the protest mentioned in the motion for a new trial was a private protest to the judge. This court has held that private communications between the judge and counsel are not matters that can be reviewed here. *Grant v. State*, 97 Ga. 790, 25 S. E. 399; *Stancell v. Kenan*, 33 Ga. 56. So, we will consider the motion merely as if the jury were allowed to disperse without the consent of the counsel. This is not an open question in this court. As early as the case of *Stancell v. Kenan*, *supra* (decided August, 1861), this court held that it was a matter of discretion for the trial judge as to whether he would allow the jury to disperse or not during the trial of the case. In discussing this question, JENKINS, J., said: "Is it, then, erroneous in the court to permit a special jury, engaged in a protracted trial of a civil cause, to separate, whenever the court takes a recess, for necessary refreshment, no motion being made *contra*, or cause shown for not doing so? We think not. It is a matter of practice that may well be submitted to the sound dis-

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cretion of the court, the usual caution being given to the jurors not to converse with anyone touching the case during such separation." And this seems to be the practice in other jurisdictions. 2 Thomp. Trials, § 2548, and cases there cited; 12 Am. & Eng. Enc. Law (1st Ed.) p. 374, and cases cited. It may be argued, however, that to make a motion to the court to keep the jury in their room during the trial would prejudice counsel and his case before the jury. That, perhaps, is true; but counsel, if he desired to make such a motion, could request the court to have the jury retired, and then make it, and show his reasons for desiring the jury to be kept together. If the reasons were sufficient, no judge, in our opinion, would deny the motion. If he should refuse it, then it would be a subject-matter of review in this court, because it would have been made in open court, and a decision pronounced thereon.

2. Under the facts disclosed by the record, there was no error in giving the law in relation to the duties of railroad companies in approaching public crossings. It was argued

here that this law was inapplicable to the facts of the case, as the crossing was so near the starting point of the train that it would be impossible to comply with the law. We understand from the record and the argument of counsel that this crossing where the injury was inflicted was some half a mile below the depot from which the train started. It was held in the case of *Harris v. Railroad Co.*, 78 Ga. 526, 30 Am. & Eng. R. Cas. 581, 3 S. E. 355 (5), that the statute does not require that a train started at or upon a public crossing should be checked, and kept checked, while passing over that crossing. This was held, for the reason that the train could never pass over the crossing if it was checked, and kept checked. Where the crossing is a sufficient distance from the starting point of the train to allow it to get under way, we think that the law is applicable, as was held in the case of *Railway Co. v. Markens*, 88 Ga. 60, 13 S. E. 855, 14 L. R. A. 281. We agree with the learned counsel that this law which requires

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trains to check, and keep checking, when approaching crossings, is a hard one, and that it is impossible for the railroads of the country to transact the business of the country and obey it. It was passed about 50 years ago, before the people appreciated the necessity of rapid transit in travel and in freight. If the law was duly obeyed by the locomotive engineers, I am informed that it would take 12 hours or more to run a passenger train from Atlanta to Macon, a distance of about 100 miles. Still, it is the law of the land, and the courts must enforce it, however hardly it may work upon the business interests of the country, if it should be observed, or upon the railroads when they violate it. Where the servants of the railroad company fail to observe it, and any person or property is injured upon the crossing, the company can make no defense except that the injury was done by the consent of the person injured, or that he could have avoided the injury by the observance of ordinary care, or that his negligence contributed to it, in the way of mitigation of damages. *Railroad Co. v. Newton*, 85 Ga. 517, 11 S. E. 776. Two of these defenses were set up in this case: (1) That the driver of the wagon could have prevented the injury by the exercise of ordinary care; (2) by his own negligence he contributed to the accident. These matters were, doubtless, submitted to the jury under proper instructions from the court, and they must have found that the driver did observe proper care, and that no negligence of his contributed to the injury.

3. The jury found a verdict for \$400. This was \$40 more than the highest proven value of the property, including expenses in curing the mule, etc. The court directed this amount to be written off, which was done by the plaintiff. The amount thus written off ^{Excessive Verdict.} left the amount of the verdict within the proven value of the property, including expenses, etc. The trial judge being satisfied with the verdict as written off, this court cannot say that it is so excessive as to require a new trial. Judgment affirmed. All the justices concurring.

St. Louis, etc., Ry. Co. v. Dawson

ST. LOUIS, I. M. & S. RY. CO.

v.

DAWSON.

(Supreme Court of Arkansas, March 10, 1900.)

Death by Wrongful Act—Survival of Action.*—Deceased, a girl between 6 and 7 years of age, was seen on the track a short distance in front of the engine. Immediately after the train passed over her, she was discovered lying on the track, apparently unconscious, though she was seen to breathe; and, in a moment or so, after giving a couple of gasps, was dead. *Held*, that a right of action for her pain and suffering survived to her personal representative; as she lived after the act constituting the cause of action, and it was immaterial whether or not she was conscious.

Same—Conscious Suffering—Burden of Proof—Excessive Verdict.—But in an action for the benefit of deceased's estate, for the pain and suffering endured by her, a verdict for \$4,000 was excessive; as plaintiff did not prove there was any appreciable interval of conscious suffering, or, if any was proved, it was not shown to have extended beyond a moment.

Same—Contributory Negligence of Parent.†—In an action by a parent, for his own benefit as next of kin, to recover for the death of his child, a girl between 6 and 7 years of age, it was a question for the jury whether the conduct of plaintiff in permitting deceased to go visiting unattended, when he knew she would have to pass railway tracks, upon which she was killed by defendant's train, when the train was overdue, and might be expected at any moment, was contributory negligence barring recovery.

APPEAL by defendant from Woodruff county circuit court.
Reversed.

On the 9th day of June, 1896, Marie Dawson, the daughter of plaintiff, M. L. Dawson, while crossing the railway track

*See *note*, 10 Am. & Eng. R. Cas., N. S., 608.

†See *Dan v. Citizens' St. R. Co. (Tenn.)*, 10 Am. & Eng. R. Cas., N. S., 880, *abstr.*, and *note*, 880 *et seq.*

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of the St. Louis, Iron Mountain & Southern Railway Company at Hayne's station, was struck by a locomotive, run over, and killed. She was between 6 and 7 years of age, and had started on a visit to some companions who lived in the portion of the town across the railway from her home. She was seen on the track a short distance in front of the engine, but no witness saw her at the time she was struck. After the train passed over her, she was discovered lying on the track. She had been pushed along the track, and looked like a bundle of rags. One of her legs was cut off above the knee, and a portion of the entrails protruded. One witness testified that, with these exceptions, the body was not much mutilated, though he said the skull was broken. Those who reached her first testified that she did not move, and did not appear to be conscious, though she was seen to breathe. "Some one called her, 'Marie, Marie,' but she never spoke. She gave a couple of gasps, and in a moment or so was dead." This action was brought by the plaintiff, as administrator of the estate of Marie Dawson. There were two causes of action set up in separate paragraphs of the complaint. One sought a recovery in behalf of her estate for the pain and suffering caused her by the injury. The second paragraph sought a recovery in behalf of plaintiff, and for his use and benefit, as her father and next of kin. The jury found in favor of plaintiff, and assessed the damages on the first count, for pain and suffering, at \$4,000, and at \$500 on the second count. The railway company appealed.

Dodge & Johnson, for appellant.

McCulloch & McCulloch, for appellee.

RIDDICK, J. (after stating the facts). We think the evidence sufficient to support the finding of the jury that the employees of the company in charge of the train were guilty of negligence causing the death of plaintiff's child. We are also of the opinion that a right of action survived

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to the personal representative; for the survival of the
Death by Wrong-
ful Act—Survival
of Action. action depends upon whether the injured child

lived after the act constituting the cause of
 action, and it is not material whether she was conscious or
 not. If she lived after her right of action was complete, this
 right, which she possessed, passed, by virtue of the statute, to
 her personal representative. *Davis v. Railway*, 53 Ark. 127, 44
 Am. & Eng. R. Cas. 690, 13 S. W. 801, 7 L. R. A. 283; *Hollen-
 beck v. Railroad Co.*, 9 Cush. 478; *Mulchahey v. Car-Wheel
 Co.*, 145 Mass. 281, 14 N. E. 106. But when the administrator
 sues, for the benefit of the estate, to recover for
 the pain and suffering endured by the deceased,
 the period for which damages can be assessed
 ends with the life of the deceased. *Davis v.*

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dict.

Railway, 53 Ark. 127, 44 Am. & Eng. R. Cas. 690, 13 S. W.
 801, 7 L. R. A. 283. The administrator can recover only
 such an amount as the deceased might have recovered had
 she been miraculously restored to life and health at the
 moment of her death. The burden of proof is on plaintiff to
 show that the deceased, as a result of the injury, underwent
 conscious pain and suffering. The cases, with few exceptions,
 hold that, for injury causing instantaneous death, no recov-
 ery can be had for pain and suffering. And the same rule is
 applied when, though life remains a few moments, uncon-
 sciousness instantly follows the injury; for in such a case
 no conscious suffering is shown. Some of the cases go fur-
 ther, and hold that, although a moment's interval of con-
 scious suffering be proved, if this be a mere incident to the
 death, no recovery can be had for pain and suffering. This
 question was considered in the case of *The Corsair* (decided
 by the supreme court of the United States in 1891), 12 Sup.
 Ct. 949, 36 L. Ed. 727. In that case the person for whose
 pain and suffering damages were sought was a passenger on
 the tug *Corsair*, which was negligently run against the bank
 of the Mississippi river, and sunk in about 10 minutes after
 the collision. It was contended in that case that the
 deceased suffered great mental and physical pain and shock,

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and endured the tortures and agonies of death. "But," said the court, "there is no averment from which we can gather that these pains and sufferings were not substantially contemporaneous with her death, and inseparable, as a matter of law, from it. Had she suffered bodily wounds and bruises from the result, of which she lingered and ultimately died, it is possible that her sufferings during her illness would give a separate cause of action; but the very fact that she died by drowning indicates that her sufferings must have been brief, and, in law, a mere incident to her death. Her fright for a few minutes is too unsubstantial a basis for a separate estimation of damages." *Kennedy v. Sugar Refinery*, 125 Mass. 90; *Moran v. Hollings*, 125 Mass. 93; note to *Brown v. Railway Co.* (Tenn. Sup.), 70 Am. St. Rep. 667 (s. c. 47 S. W. 415). There are, however, cases seemingly in conflict with this decision. The supreme court of New Hampshire, in a case where damages were sought for death occasioned by drowning, held that the circumstances, showing death by drowning in muddy, stagnant, and slimy water, were such that "the jury might legitimately infer, not only that the death was not instantaneous, but that it was attended with both physical and mental pain and suffering." *Clark v. Manchester*, 64 N. H. 471, 13 Atl. 867. Of course, these cases turn to some extent, upon the statute giving the right of action; for at common law there was no right of action for injuries causing death. By a strange fiction, the extremity of the wrong precluded the redress. *Goodsell v. Railroad Co.*, 33 Conn. 55. But, whichever view we should adopt as to death by drowning, or when some brief interval of conscious suffering before death was shown, we do not think a judgment for \$4,000 on the first count of the complaint can be sustained, under the facts of this case; for no appreciable interval of conscious suffering was proved, or, if any was proved, it is not shown to have extended beyond a moment. The burden of showing this suffering was on plaintiff, but we see nothing in the evidence to establish it,

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unless it may be inferred from the fact that the train was not running rapidly. No witness saw the child at the time she was struck. No one heard any cry or groan, or testified to any act such as might indicate conscious suffering. Those who saw her after the train passed say that she did not move or appear to be conscious. After they reached her, she breathed once or twice, and was dead. Counsel for appellee contends that she was not killed or rendered unconscious by the engine, but by the cars behind the engine, and this, no doubt, was the view taken by the jury in estimating the damages. But plaintiff's case is based on the theory that the child was struck and run over by the engine, and as no witness saw her after she was struck, until the entire train had passed, the argument that she received her mortal injuries, not from the engine, but from the cars behind, is based on conjecture only. It is pure guesswork, and not sufficient to sustain the judgment.

The cases decided by the supreme court of Iowa, and cited by counsel for appellee on this point, do not conflict with this conclusion. Those cases hold that a right of action survives to the administrator of the person injured, though the deceased survived the injury only for a moment. But in that state no damages are allowed for pain and suffering unless the action is commenced by the injured party himself. If the action is brought by the administrator, compensation for pecuniary loss to his estate is alone considered; and the courts then hold that bodily pain and suffering in no manner affect the estate, and that in such actions there is no basis for such damages. *Dwyer v. Railway Co.*, 84 Iowa 479, 51 N. W. 244. So in this state an action will lie, for the benefit of the next of kin, to recover damages suffered by them on account of the wrong, though the death be instantaneous. But, when plaintiff seeks to recover for pain and suffering borne by deceased, there must be evidence to show such suffering, before a judgment can be sustained on that ground. In assessing damages for wrongs causing death, the law does not undertake to find a sum equal to the value of life to

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the deceased, or for which the person killed would have voluntarily suffered death. That would be impracticable; for to most persons life is a priceless gift, which would not be surrendered for the value of an entire railroad paid to their estate. Nor, in allowing a recovery for pain and suffering, does it aim to fix a sum that would lead one willingly to endure such pain; for few would consent to have a leg crushed off, and bear the loss, for many times the sums allowed. *Railway Co. v. Milliken*, 8 Kan. 647. "In the absolute sense," said the supreme court of Georgia, "damages equivalent to all the assets of a railroad company might not be excessive, nor even adequate, for a serious personal injury resulting from its negligence; but in any practical sense the damages in each case must be graduated so that there may be railroads left in existence, and so that all like injuries occasioned by their use may be compensated in some reasonable degree." *Railroad Co. v. Young*, 83 Ga. 512, 10 S. E. 197. The injury being irreparable and already suffered, the jury, after hearing the evidence, are allowed to assess a sum which, in their judgment, they deem a reasonable compensation; having regard for the severity and duration of the pain and suffering. On this paragraph of the complaint the only damages sought are for pain and suffering, and this is not shown to have lasted longer than an instant. The jury in such cases are given great latitude, for courts do not undertake to measure pain and suffering; but their judgment is not altogether uncontrolled, and, when such questions are brought before the judge on motion for new trial, in determining whether the proper bounds have been exceeded he must, to a large extent, be governed by the practice of courts in such cases, as shown in the decision. In view of these decisions, all of which, so far as we know, hold that in cases of instantaneous death nothing can be recovered for pain and suffering, the judgment on the first count, even if the evidence justifies more than nominal damages, must be regarded as excessive, and probably allowed by the jury on the theory, argued here, that the child continued to suffer

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conscious pain and mental agony after the engine had passed over her, of which, as we have stated, there is no evidence. The argument on this point, and the amount of the verdict, convince us that the jury based their assessment of damages on a view of the facts not supported by the evidence, and we think that it should be set aside.

On the second count, brought by the father as the personal representative of the deceased, and for his benefit as next of kin, the jury assessed the damages for injury sustained at the sum of \$500. The evidence showed that the

Same—Contributory Negligence of Parent.

deceased was a bright, healthy child, between 6 and 7 years of age; and, in view of this and other circumstances in proof, we think that, if defendant is liable, the verdict was moderate. But on the trial the court refused to instruct the jury that the plaintiff could not recover on this count if it was shown that he was guilty of negligence contributing to his injury. While the negligence of the parent will not be imputed to the child, and the administrator of its estate, if dead, may recover damages for pain and suffering caused by negligence of defendant, notwithstanding the parent himself was guilty of negligence contributing to the injury, yet the rule is different when the parent sues, not for the estate, but for his own benefit. In such a case the rule that no one can recover damages for an injury caused by his own negligence applies. If this rule is sound when applied to cases where one sues for an injury to himself, there are stronger reasons to support it when he asks damages for injuries to another. Love of life and dread of pain would usually restrain one from subjecting himself to injury, for the purpose of basing thereon an action for damages, even if contributory negligence did not bar a recovery. But it might be different with regard to injuries to others, and it would be specially unwise and dangerous to remove this restraint in such cases. We therefore think that the instruction asked should have been given. The child was too young to be guilty of negligence, and we do not say that the father was guilty in that regard. But he allowed his young child

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to go visiting, when he knew that she would have to pass the railway tracks. The train at that time was overdue, and might be expected at any moment. She was allowed to go unattended, and without having been specially cautioned to avoid the trains. Under these circumstances, it was a question for the jury to say whether he was guilty of contributory negligence, and the instruction asked by appellant on this point should have been given. For these reasons, the judgment on the whole case must be reversed, and a new trial ordered.

TEXARKANA & FT. S. RY. CO.

v.

ANDERSON.

(*Supreme Court of Arkansas, Nov. 4, 1899.*)

Chartered Train—Injuries to Passenger—Liability of Railroad.*—A railroad company cannot, by leasing or hiring its cars temporarily, relieve itself of liability for carrying persons thereon beyond stations where they desire to get off, and from the duty of protecting passengers from the misconduct of one another.

Damages—Mental Suffering.†—There can be no recovery for mental suffering without showing some personal injury as a basis of the action.

Carrying beyond Destination—Insults—Nominal Damages.—It appeared that plaintiff was delayed two hours, under ordinary circumstances; that the conductor was drunk and spoke "short, like" to plaintiff; and that some of the other passengers on the car were drunk, boisterous, and profane. *Held*, that only nominal damages were recoverable.

APPEAL by defendant from Little River county circuit court. *Reversed.*

Trimble & Braley, John A. Eaton, and Shaver & Norwood, for appellant.

Collins & Lake and T. E. Webber, for appellee.

*See *Pierce v. North Carolina R. Co.* (N. Car.), 13 Am. & Eng. R. Cas., N. S., 666, and *foot-note*.

†See notes at end of case.

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BUNN, C. J. This is an action for personal damages, laid in the complaint at \$2,500, and verdict and judgment for \$500, from which the defendant railway company appeals. Perhaps to state the case in the briefest and most intelligible manner is to quote from the allegations in the complaint, and then give the evidence in support of the same: "The plaintiff, Turie Anderson, states that the defendant, the Texarkana & Ft. Smith Railway Company, is a corporation organized under the laws of the state of Arkansas, and operated between Texarkana, Arkansas, and Horatio, in said states; that on the 25th day of July, 1895, plaintiff, desiring to go to Ashdown (a point on said railroad), purchased from defendant's agent at Mistletoe (one of defendant's passenger stations) tickets for herself and two children to Ashdown and return, and paid therefor a valuable consideration, to wit, the sum of forty cents each; that said tickets entitled plaintiff and her children to first-class passage on the passenger trains of defendant company to Ashdown and back to Mistletoe. Plaintiff further says that on said 25th day of July she offered herself and said two children as passengers to the conductor of one of defendant's passenger trains, and was by said conductor accepted as such both to Ashdown and return. She further says that she and her two children were properly and safely conveyed to Ashdown, but that on her return from Ashdown to Mistletoe, in the evening of said day, plaintiff and her said children were exposed to taunts and insults from both passengers and employees of defendant company; that the conductor in charge of said train, and other employees connected therewith, together with a number of the passengers, were drunk, and consequently boisterous and insulting to plaintiff and other lady passengers; that before reaching Mistletoe, plaintiff's destination, she notified said conductor that she desired to leave the train there, and demanded that he bring the train to a stop, which he at the time, with an oath, refused to do; that by reason of such refusal plaintiff was compelled to pass her destination and go on to Horatio,

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the terminus of defendant's road, a distance of — miles, and that the trip to Horatio and back to Mistletoe was made at imminent risk to lives of plaintiff, her said children, and other passengers, by reason of the drunken and reckless condition of defendant's employees and passengers on said train; that said employees and passengers were swearing, carousing, and shooting off firearms, and demeaning themselves otherwise to the alarm of plaintiff. Plaintiff further says that, if she had been permitted to leave the train at her destination, she could have reached her home (about two miles from defendant's line of road) early in the evening, whereas, in consequence of having been negligently and carelessly carried beyond same, she could not and did not reach her home until late in the night. Plaintiff further says that by reason of defendant's carelessness, insults, and negligence, plaintiff was damaged in the sum of two thousand and five hundred dollars, wherefore she asks judgment against defendant company for said sum of two thousand five hundred dollars, and others proper relief." This complaint was sworn to positively, and the defendant answered as follows, to wit: "Defendant denies that plaintiff purchased passenger tickets from it, or rode on its passenger train, and denies that its employees were in charge of said train, or were drunk or guilty of any misconduct, and denies that it carried plaintiff by any station, or that she has been damaged in the amount sued for, or any other amount, by reason of any act or default of defendant. Defendant avers that plaintiff was riding on an excursion train, which had been chartered from defendant by others, and which was not under defendant's control, except as to its safe movement over defendant's track; that all tickets on said excursion train were sold, and fares collected, by the parties who chartered said train from defendant for picnic or excursion purposes; that plaintiff agreed with those in charge of said train to ride thereon to Horatio and return to Mistletoe, which she did voluntarily, and was safely conducted accordingly, wherefore she is estopped from complaining."

Upon the theory that this was an excursion train chartered

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by a third party for the day, for the purpose of carrying picnickers or excursionists, as set forth in the answer, at the instance of the plaintiff the court gave instruction No. 2, over the objection of defendant, which is as follows: "You are instructed that the defendant company cannot relieve itself of liability by evidence that it had leased its train to individuals to run an excursion train over its railroad, if said company had an agent and representative on said train, who controlled the motive power, and was subject to orders from headquarters of said road as to the movement of the said train with relation to other trains, and its safe conduct; and if you find from the evidence that the defendant company had this employee on said train who [was] were engaged in the operation of the said train, then the defendant company would be liable to plaintiff for any damages shown by evidence to have been sustained by her by reason of said train not being stopped at her station, if the evidence shows it was not stopped at said station." On the other hand, the court refused to give the following instruction asked by the defendant, to wit, No. 3: "You are instructed that if private individuals obtained the use of said train for the purpose of running an excursion, and paid a rental therefor, and sold tickets thereover, one of which was sold to plaintiff, and that she purchased the said ticket and took passage upon said train, the relation of passenger and carrier did not arise between the plaintiff and defendant, and that, if such relation arose, the same is between the parties chartering or leasing the said train and the plaintiff, and she will not be entitled to recover for a failure to stop said train at Mistletoe upon the return trip to Ashdown." The instruction numbered 4, immediately following, is of similar import.

The other instructions affecting the questions given by the court at the instance of the plaintiff over the objection of the defendant were given upon the theory that plaintiff sustained the relation of a passenger on a passenger train, and that the defendant owed her the duty it owed to passengers generally and ordi-

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narily; and the issue of law was thus made by the instructions given and refused as aforesaid, whether or not a railroad company can, by leasing or hiring out its cars temporarily, as in this case, relieve itself of liability for carrying persons thereon beyond stations where they desire to get off, and from the duty of protecting passengers from the misconduct of one another, as in ordinary cases. A majority of the court are of the opinion that the company was liable for such injuries as might be shown to have been done, under these heads, in this case, growing out of its negligent running and control of the train. This is the doctrine of many, and may be most, of the courts; and, as a fair exponent of the same, we cite the opinion in the case of *Harmon v. Railroad Co.*, 17 S. C. 401, 5 S. E. 835. In that case the character of the railroad company was granted directly by the legislature, and there was a provision in it that the company might "farm out" its right of transportation to others. The circuit judge, on this peculiar provision, had held that the company leasing its road to another was relieved of liability for damages accruing during the time the road was operated by the lessee. This ruling was reversed by the supreme court of that state, and the doctrine here announced by a majority of the court was sustained. It is unnecessary to make other citations, as that one presents the argument concisely.

The next question in the case at bar grows out of the evidence, and is made by the giving of the following instruction at the instance of the defendant, over the objection of the plaintiff, to wit, No. 7: "You are instructed that a person who, in violation of his contract of carriage, is carried beyond her destination, is entitled to recover all damages she has actually suffered, and which approximately resulted from the failure to permit her to alight at the station to which she contracted to be carried. In this connection, in the absence of physical injury, she may recover compensation for the inconvenience, loss of time, labor, and expense of traveling back, but not for anxiety and suspense of mind suffered in

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consequence of the delay, or of the danger, real or imagined, to which she was so exposed, and which was attendant on her trip made subsequently to the time she should have been permitted to alight. Hence, it follows, if, from the testimony, you believe that the plaintiff herein was, in violation of her contract, carried past her destination of Mistletoe, and as a result of same was carried on to the station of Horatio, and thence back to Mistletoe again, she may recover for all inconvenience she suffered thereby; also, for the value of her loss of time, her labor and expense of traveling back, if any is shown by the evidence; but not for any anxiety and suspense of mind suffered in consequence of the delay incurred in reaching home, or for any apprehended danger that attended her trip to and from the station of Horatio." In our view of the question, there was no material error in giving this instruction. The question raised thereby is simply the oft-recurring question, whether or not one can recover for mental suffering without showing some personal injury as a basis of the action, independent of mental suffering, an incident of the main cause of action, and, of course dependent upon it. In *Peay v. Telegraph Co.*, 64 Ark. 538, 43 S. W. 965, this court, in a well-considered opinion by MR. JUSTICE HUGHES, and in which all the then available authorities are cited, said, "Damages for mental pain and anguish are not recoverable for negligent failure of a telegraph company to make prompt delivery of a telegram." And this on the ground stated by JUDGE ENGLISH in *Railway Co. v. Barker*, 33 Ark. 350, therein cited with approval, that "there must be a loss to claimant that is capable of being measured by a pecuniary standard. A mere injury to the feelings cannot be considered." This doctrine was really involved in *Railroad Co. v. Deloney*, 65 Ark. 177, 45 S. W. 351, although we denied the claim for damages for mental suffering in that case because of the remote connection of the mental suffering with the injury complained of as the basis of the action. Practically there is little difference in principle. This subject is fully

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treated in *Trigg v. Railway Co.*, 74 Mo. 147, where it is held (quoting from the syllabus) that: "A passenger on a railroad train, who is carried beyond her station by negligence of the company, but without any circumstances of aggravation, and without receiving any personal injury, may recover compensation for the inconvenience, loss of time, labor, and expense of traveling back, but not for anxiety and suspense of mind suffered in consequence of the delay, nor the effects upon her health, nor the danger to which she was exposed in consequence of the train being stopped at her station an insufficient length of time to enable her to get off." In the case at bar there do not appear to have been any circumstances of aggravation such as are referred to in the foregoing extract; and, as to the evidence in support of the allegations of the complaint, all that is proper to say will be said on the last proposition we deem it necessary to consider at this time; that is, whether or not the damages were excessive. It is not claimed that there was any personal injury, and no proof is adduced showing the value of the time and labor lost and expense incurred, or of any inconvenience other than is ordinarily attendant,—a mere delay of two hours, without peculiar circumstances giving unusual importance to the delay. The testimony of plaintiff and her son, a grown young man who accompanied her on this excursion, at most shows that, in the conversation between her and the conductor, the latter spoke "short, like," that he was drunk, and that some of the people on the train were drinking and boisterous, some cursing, and one or more singing the popular songs of the day. None of this is claimed to have been directed at plaintiff, and all is denied or so explained by other witnesses as to amount to nothing as a basis of a damage claim. Further than this we deem it improper to comment on the evidence. Nominal damages are all that could be properly recovered under such a state of things, and, of course, the \$500 assessed was excessive. The judgment of the court is therefore reversed for want of

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evidence to sustain it, and the cause is remanded for a new trial.

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Damages—Mental Suffering—General Rule.—There can be no recovery from mental suffering, where there has been no physical injury, except where they are recoverable as a species of punitive damages.

United States.—Chicago, R. I. & P. R. Co. *v.* Caulfield, 27 U. S. App. 358, 63 Fed. Rep. 396; Morse *v.* Duncan, 14 Fed. Rep. 396.

Connecticut.—Maisenbacker *v.* Society Concordia, 71 Conn. 369, 42 Atl. Rep. 67.

Illinois.—Chicago City R. Co. *v.* Canevin, 72 Ill. App., 2 Chic. L. J. Wkly. 600; Chicago City R. Co. *v.* Anderson, 80 Ill. App. 71; Logan *v.* Western U. Teleg. Co., 84 Ill. 468; Chicago City R. Co. *v.* Taylor, 170 Ill. 49, 9 Am. & Eng. R. Cas., N. S., 513, 48 N. E. Rep. 831.

Indiana.—Kalen *v.* Terre Haute & J. R. Co., 18 Ind. App. 202, 47 N. E. Rep. 694; Western U. Teleg. Co. *v.* Briscoe, 18 Ind. App. 22, 47 N. E. Rep. 473; Reese *v.* Western U. Teleg. Co., 123 Ind. 294, 7 L. R. A. 583.

Iowa.—Mentezer *v.* Western U. Teleg. Co., 93 Iowa 752, 28 L. R. A. 72.

Kentucky.—Dawson *v.* Louisville, etc., R. Co., 11 Am. & Eng. R. Cas. 134.

Michigan.—Lucker *v.* Liske, 111 Mich. 683, 70 N. W. Rep. 421, 3 Det. L. N. 850; Batterson *v.* Chicago, etc., R. Co., 8 Am. & Eng. R. Cas. 123.

Mississippi.—Dorrah *v.* Illinois Cent. R. Co., 65 Miss. 14, 7 Am. St. Rep. 629.

Missouri.—Michael *v.* Matheis, 2 Mo. A. Rep. 175, 77 Mo. App. 556; Randolph *v.* Hannibal, etc., R. Co., 18 Mo. App. 609; Spohn *v.* Missouri Pac. R. Co., 116 Mo. 617; Winkler *v.* St. Louis, etc., R. Co., 21 Mo. App. 99; Trigg *v.* St. Louis, etc., R. Co., 74 Mo. 147, 41 Am. Rep. 305.

Nevada.—Johnson *v.* Wells, 6 Nev. 224.

New York.—O'Flaherty *v.* Nassaw Electric R. Co., 34 App. Div. 74, 58 Alb. L. J. 347, 54 N. Y. Supp. 96.

North Carolina.—Laundie *v.* Western U. Teleg. Co., 124 N. Car. 528, 32 A. E. Rep. 886; Lyne *v.* Western U. Teleg. Co., 123 N. Car. 129, 5 Am. Neg. Rep. 85, 31 S. E. Rep. 350; Cashion *v.* Western U. Teleg. Co., 123 N. Car. 267, 31 S. E. Rep. 493.

Ohio.—Smith *v.* Pittsburgh, etc., R. Co., 23 Ohio St. 10.

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Texas.—*Forke v. Homann*, 39 S. W. Rep. 210, 14 Tex. Civ. App. 670; *Western Union Teleg. Co. v. Teague* (Tex. Civ. App.), 36 S. W. Rep. 301; *Missouri, K. & T. R. Co. v. Warren*, 90 Tex. 566, 40 S. W. Rep. 6; *So Relle v. Western U. Teleg. Co.*, 55 Tex. 308, 40 Am. Rep. 805.

Vermont.—*Bovee v. Danville*, 53 Vt. 183.

Canada.—*Henderson v. Canada Atlantic R. Co.* 4 Ont. App. 437.

England.—*Blake v. Midland R. Co.*, 18 Q. B. 111, 83 E. C. L. 111.

Where Mental Suffering Proximate Result of Actionable Wrong.—According to some decisions (principally telegraph cases), however, mental suffering is an element of damages where it is a proximate result of an actionable tort, although there is no physical injury.

United States.—*Beasley v. Western U. Teleg. Co.*, 39 Fed. Rep. 181; *Barbour v. Stephenson*, 32 Fed. Rep. 66.

Alabama.—*Western U. Teleg. Co. v. Henderson*, 89 Ala. 510.

Connecticut.—*Swift v. Dickerman*, 31 Conn. 285.

Indiana.—*Reese v. Western U. Teleg. Co.*, 7 L. R. A. 583, 123 Ind. 294; *Cox v. Vanderkleed*, 21 Ind. 164; *Simons v. Busby*, 119 Ind. 13.

Iowa.—*Hampton v. Jones*, 58 Iowa 317.

Kentucky.—*Chapman v. Western U. Teleg. Co. (Ky.)*, 30 Am. & Eng. Corp. Cas. 626.

Massachusetts.—*Canning v. Williamstown*, 1 Cush. 451; *Hatch v. Fuller*, 131 Mass. 574.

Minnesota.—*Russell v. Chambers*, 31 Minn. 54; *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370.

Missouri.—*Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599; *Trigg v. St. Louis, etc., R. Co.*, 74 Mo. 147, 41 Am. Rep. 305.

North Carolina.—*Thompson v. Western U. Teleg. Co.*, 106 N. C. 549; *Young v. Western U. Teleg. Co.*, 9 L. R. A. 669, 107 N. C. 370.

Oregon.—*Breon v. Henkle*, 14 Oregon 404.

Rhode Island.—*Vogel v. McAuliffe*, 18 R. I. 791.

Tennessee.—*Wadsworth v. Western U. Teleg. Co.*, 86 Tenn. 695.

Texas.—*Stuart v. Western U. Teleg. Co.*, 66 Tex. 580; *Gulf, C. & S. F. R. Co. v. Wilson*, 69 Tex. 739; *Western U. Teleg. Co. v. Cooper*, 1 L. R. A. 728, 71 Tex. 507; *Western U. Teleg. Co. v. Broesche*, 72 Tex. 654; *Western U. Teleg. Co. v. Simpson*, 73 Tex. 423; *Western U. Teleg. Co. v. Adams*, 6 L. R. A. 844, 75 Tex. 531.

West Virginia.—*Riddle v. McGinnis*, 22 W. Va. 253.

Wisconsin.—*Summerfield v. Western Union Tel. Co.*, 87 Wis. 1; *Giese v. Shultz*, 53 Wis. 462; *Brown v. Chicago, M. & St. P. R. Co.*, 54 Wis. 342.

Liability for Carrying Passengers beyond Destination—Damages—Mental Anxiety.—See *note*, 10 Am. & Eng. R. Cas., N. S., 260.

Ejection of Passenger—Damages—Mental Suffering.—See *Louisville & N. R. Co. v. Hine* (Ala.), 14 Am. & Eng. R. Cas. N. S., 382, and *note*, 391.

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Shame and Mortification Caused by Personal Injuries.—See *Beath v. Rapid Ry. Co.* (Mich.), 15 Am. & Eng. R. Cas., N. S., 793, and *note*, 804.

Wrongful Death—Solatium for Wounded Feelings.—See *Walker v. McNeil* (Wash.), 11 Am. & Eng. R. Cas., N. S., 738, and *note*, 755 *et seq.*

Mental Suffering of Deceased and Relatives.—See *Louisville & N. R. Co. v. Sander's Adm'r* (Ky.), 10 Am. & Eng. R. Cas., N. S., 528, and *note*, 533 *et seq.* See also *note*, 10 Am. & Eng. R. Cas., N. S., 542 *et seq.*

Inconvenience.—See *note*, 12 Am. & Eng. R. Cas., N. S., 55.

GULF, C. & S. F. RY. CO.

v.

HAYTER *et al.*

(*Supreme Court of Texas, Jan. 15, 1900.*)

Physical Injury from Mental Shock—Damages.*—Where a physical injury results from a fright or other mental shock, caused by the wrongful act or omission of another, the injured party is entitled to recover damages, provided the act or omission is the proximate cause of the injury, and the injury ought, in the light of all the circumstances, to have been foreseen as its natural and probable consequence.

ERROR by defendant to Fifth supreme judicial district court of civil appeals. *Affirmed.*

J. W. Terry, for plaintiff in error.

Neyland & Neyland, T. D. Montrose, and *Lee A. Clark*, for defendant in error.

GAINES, C. J. This suit was brought by the defendant in error against the plaintiff in error. He recovered a judgment, which, upon appeal, was affirmed by the court of civil appeals. The plaintiff was a passenger on a train of the Missouri, Kansas & Texas Railway Company, which was

*See notes at end of case.

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struck by a freight train of the defendant company at a point where the road of the former company is crossed by that of the latter. He was seated in the smoking car, and the train upon which he was riding was passing the crossing at the time the collision occurred. It was struck about the coupling between the chair car and the sleeping car. Among other things, he testified as follows: "That the M., K. & T. train had stopped for the crossing, and was just moving forward, when he saw the Santa Fe train approaching the crossing at a rapid rate of speed, at a distance therefrom of about one quarter of a mile. I did not think at this time that there would be a collision. About the time the Katy train started over the track at the crossing, it suddenly moved forward with a jerk, and increased speed. The whole of it got across the crossing except the chair car and the sleeper. The Santa Fe train ran into the Katy train about the coupling between the chair car and the sleeper. The Katy train came to a sudden stop, jarring plaintiff considerably, but he did not realize that he was hurt until he got off the train. * * * The coach that plaintiff was sitting in did not leave the track, but the chair car, which was next behind the car in which plaintiff was riding, and the sleeping car, which was the rear car of the train, both left the track,—were derailed. That plaintiff was not knocked off his seat, nor did the collision tear his hands loose from the hold he had taken, nor knock him from the seat, nor disturb his position any that he could tell, but it frightened him greatly." There was testimony tending to show that a serious nervous affection, known as "traumatic neurasthenia," resulted from the accident, and that this may have been caused either by the physical shock or by the mental shock produced by fright, or by both. The trial court ruled, and in effect charged the jury that, if the negligence of the servants of the defendant company caused a collision between the two trains, "and * * * that, as a direct result of said collision, plaintiff received a mental shock, or a physical injury, or both, that caused a disease

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or sickness to develop from which plaintiff has suffered physical pain and mental anguish, and * * * such negligence of the Santa Fe Company was the proximate cause of such disease or sickness," they should find a verdict for him.

The only error assigned in this court is "that the court of civil appeals erred in holding that the plaintiff can recover for injuries, the result of mere shock or fright, when the defendant had not inflicted any bodily injury, and had caused no other disturbance to the plaintiff than such fright or shock." The question thus presented is one upon which there is a decided conflict of authority. It is generally held that for mental suffering accompanying physical injuries, negligently inflicted, damages may be recovered; but many courts hold that for sickness, impairment of the mental faculties, or physical lesions which merely result from a mental emotion caused by the wrongful act or omission of another, but which do not accompany such mental emotion, no recovery can be had. This court has held that there can be no recovery for mere fright neither attended nor followed by any other injury. *Railway Co. v. Trott*, 86 Tex. 412, 25 S. W. 419. But in *Hill v. Kimball*, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618, —which presented a similar question to that before us,—we held that a recovery could be had for a miscarriage alleged to have been caused by a mental shock, unaccompanied by any physical violence whatever to the person of the injured woman. That, however, was a very strong case, and when we granted the writ of error we were in doubt whether that decision justified the ruling of the trial court and of the court of civil appeals in the present case, 55 S. W. —. We have, therefore, re-examined the question in the light of the very numerous authorities which have been presented by counsel, with the result that we have been unable to discover any substantial difference between the case where an injury has been inflicted through physical agencies and one in which a mental emotion constitutes one of the links in the chain of causes which have led to the injurious result. As has been pointed

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out by the supreme court of South Carolina, the courts which deny the right of recovery in the latter case are not in accord as to the ground upon which their conclusion is based. *Mack v. Railroad Co.*, 29 S. E. 905, 40 L. R. A. 679. By some it is held that a physical injury is not a natural and probable consequence of a mental emotion, however potent, and that the injury in such a case is one not reasonably to be anticipated. Others content themselves by saying, in effect, that a contrary ruling would result in a multiplication of damage suits, and in intolerable and vexatious litigation. The uncertainty and obscurity attending the facts, and the consequent difficulty of administering the law, are also urged as an objection to allowing damages for such injuries. To our minds, neither proposition affords a sufficient reason for denying a recovery in these cases. This court has announced the doctrine that, in order to constitute negligence, the act or omission must be the proximate cause of an injury which, in the light of the attending circumstances, ought to have been foreseen as a natural and probable consequence of such act or omission. *Railway Co. v. Bigham*, 90 Tex. 223, 6 Am. & Eng. R. Cas., N. S., 791, 38 S. W. 162. But, in the light of modern science,—nay, in the light of common knowledge, can a court say, as a matter of law, that a strong mental emotion may not produce in the subject bodily or mental injury? May not epilepsy or other nervous disorder or insanity result from fright? May not a miscarriage result from a mental shock? In several of the adjudicated cases in which the question under consideration has been passed upon, there was a miscarriage, caused by fright or other mental emotion. *Mitchell v. Railway Co.*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781; *Renner v. Canfield*, 36 Minn. 90, 30 N. W. 435; *Rock v. Denis*, 4 Mont. L. 356; *Fitzpatrick v. Railway Co.*, 12 U. C. Q. B. 645. On the other hand, the reported cases would indicate that the litigation arising from injuries inflicted through a mental shock are not so numerous as to cause any considerable increase of litigation; so that this objection, as

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it seems to us, rests upon an imaginary ground. It is true that in most cases it may be difficult to determine the extent of a mental shock, and its result upon the physical system. But, in our opinion, this is not a sufficient reason for refusing a remedy for damages resulting from a wrong. The same difficulty exists in many other cases in which that objection has never been urged as a reason why a recovery should be denied. We conclude that, where a physical injury results from a fright or other mental shock, caused by the wrongful act or omission of another, the injured party is entitled to recover his damages, provided the act or omission is the proximate cause of the injury, and the injury ought, in the light of all the circumstances, to have been foreseen as a natural and probable consequence thereof. In our opinion, as a general rule, these questions should be left to the determination of the jury. The following cases are in accord with our views: *Bell v. Railway Co.*, 26 L. R. Ir. 428; *Sloane v. Railroad Co.*, 111 Cal. 668, 4 Am. & Eng. R. Cas., N. S., 182, 44 Pac. 320, 32 L. R. A. 193; *Mack v. Railroad Co. (S. C.)*, 29 S. E. 905, 40 L. R. A. 679; *Purcell v. Railroad Co.*, 48 Minn. 134, 52 Am. & Eng. R. Cas. 611, 50 N. W. 1034, 16 L. R. A. 203; *Fitzpatrick v. Railway Co.*, 12 U. C. Q. B. 645. In the following the contrary doctrine is laid down: *Spade v. Railroad Co.*, 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512; *Ewing v. Railway Co. (Pa. Sup.)*, 23 Atl. 340, 48 Am. & Eng. R. Cas. 506, 14 L. R. A. 666; *Mitchell v. Railway Co.*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781; *Commissioners v. Coultas*, 13 App. Cas. 222; *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199. For the reasons given, we think that the assignment points out no error, and therefore the judgment of the district court and that of the court of civil appeals are affirmed.

NOTES.

Damages—Mental Suffering.—See *Texarkana & Ft. S. Ry. Co. v. Anderson* (Ark.), *ante*, and *note*, 44.

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Same—Injuries Resulting from Mental Shock.—Where a physical injury is the natural result of the negligence of a defendant, although it proceeds from and is the result of a mental shock caused directly by the negligent act, the defendant is liable if the jury might find from the evidence that the shock caused the injury. *Mitchell v. Rochester R. Co.*, 4 Misc. (N. Y.) 575. In this case plaintiff was nonsuited on the ground that no action would lie for a negligent act of a defendant where the only injury produced as the result of said act is fright or apprehension of danger, although such fright is followed by a physical injury which is the result of it. *Held*, that the ruling was erroneous; that the case should have gone to the jury, as on the facts it would have been competent for them to find that the negligence of the defendant was the proximate cause of plaintiff's injuries.

The fright of the plaintiff directly produced by the wrongful act, and contributing to the consequent increase of sickness, and the trouble, inconvenience, and peril and fatigue of the necessitated return to the station beyond which she had been carried, were elements of damage proper to be considered by the jury, in connection with her aggravated physical suffering. *East Tenn., V. & G. R. Co. v. Lockhart*, 79 Ala. 315.

NEAL

v.

CAROLINA CENT. R. CO.

(Supreme Court of North Carolina, May 22, 1900.)

Accident on Track—Contributory Negligence—Speed in Violation of Ordinance—Negligence as to Signals and Lookout.*—Where it appears that plaintiff's intestate was walking upon defendant's track in a town, in open daylight, on a straight piece of road, where he could have seen defendant's train by which he was run over, for 150 yards, he was guilty of contributory negligence barring recovery for his death, although the railroad company may have been guilty

*See *Crawford v. Chicago C. W. Ry. Co.* (Iowa), 16 Am. & Eng. R. Cas., N. S., 628, and *notes*, 630 *et seq.*; *Schug v. Chicago, etc., Ry. Co.* (Wis.), 15 Am. & Eng. R. Cas., N. S., 705, and *foot-note*.

As to speed in violation of ordinance, see *Overtoom v. Chicago & E. I. R. Co.* (Ill.), 15 Am. & Eng. R. Cas., N. S., 849, and *foot-note*.

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of negligence in running the train at a greater rate of speed than allowed by the town ordinance, or in not ringing its bell as required by such ordinance, and in not keeping a lookout by its engineer.

Contributory Negligence—Province of Court.—The statute of North Carolina inhibiting the court from finding an affirmative issue is not applicable in an action for wrongful death, where all the facts are admitted by a demurrer to plaintiff's evidence, and it clearly appears from such evidence that plaintiff's intestate was guilty of contributory negligence. In such a case a motion to non-suit plaintiff may be allowed.

APPEAL by plaintiff from Mecklenburg county superior court. *Affirmed.* .

Jones & Tillett and Clarkson & Duls, for appellant.

Burwell, Walker & Cansler, for appellee.

FURCHES, J. This is an action to recover damages for the wrongful killing of Charles M. Coffin. The defendant does not deny the killing, but denies that it was caused by its default or negligence, and alleges that it was the result of the negligence of plaintiff's intestate. The evidence of plaintiff showed that intestate was killed by the shifting engine on defendant's road, in the city of Charlotte; that this engine was running backwards, drawing a gondola car after it; that it was running at a high rate of speed, in a westward direction, and intestate was walking on defendant's track, going in the same direction; that this train had come very near running over a team of mules at the street crossing, scaring the mules, and making them unmanageable, and that the engineer and crew were watching the mules, and laughing at the driver trying to manage them. The road was straight for 150 yards, and, as the killing occurred in open daylight, the crew and engineer might have seen intestate, and intestate have seen the train, for that distance. The intestate was walking on the defendant's track when he was knocked down by defendant's train, run over, and killed. The plaintiff also offered in evidence an ordinance of the city forbidding trains to run at a greater speed than four miles an hour while passing through

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the city, and requiring the bell to be rung. Plaintiff showed that this train was running at a high rate of speed, and greater than that allowed by the ordinance, and that no bell was being rung. The plaintiff, having offered evidence as to amount of damages, rested the case. Defendant offered no evidence, demurred to plaintiff's evidence, and moved to nonsuit plaintiff, under chapter 109, Acts 1897. After hearing argument of counsel, and upon full consideration of the matter, the court allowed defendant's motion, and assigned the following reasons therefor: "First. That the evidence, if believed, showed the defendant guilty of negligence. Second. That the evidence being that offered by the plaintiff, and without contradiction, must, as to the plaintiff, be believed, and, if believed, it showed, and the conclusion could not be reasonably avoided, that the plaintiff's intestate, by his own negligence, contributed to cause the injury. Third. That while it might be found that, notwithstanding the negligence of plaintiff's intestate, the defendant might, by ordinary care, have avoided the injury, the evidence, which, as to the plaintiff, must be believed, clearly showed that, notwithstanding defendant's negligence, the plaintiff's intestate, by the exercise of ordinary care, might himself, up to the last moment, have avoided the injury. Therefore the negligence of plaintiff's intestate, if not the proximate cause, at least concurred with defendant's negligence, up to the last moment, in together constituting the proximate cause of the injury. The third issue, therefore, should be answered 'No,' and the plaintiff is not entitled to recover in the action. In deference to this intimation, the plaintiff, having excepted, submitted to a nonsuit, and judgment was entered accordingly." The plaintiff assigned the following grounds of error: (1) "That the court added at the end of the third issue tendered the clause, 'And, if so, was defendant's failure to avoid the injury the proximate cause thereof?'" (2) "The plaintiff assigns as error the rulings of his honor sustaining the demurrer and dismissing the action." (3) "That the court, in and by its said judgment, dismissed the

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action." The evidence was all introduced by the plaintiff; the defendant introduced none; and there is no exception as to the competency of any of the evidence.

The court finds from this evidence that the defendant was guilty of negligence; and while we think from the evidence, taken to be true, that it was guilty of negligence, as this negligence was shown by the evidence of the plaintiff, the court could not have found this issue against the defendant, if it had complained of and excepted to it, and brought it before us for review. It was the finding of an affirmative issue against the defendant upon the evidence of the plaintiff. *Spruill v. Insurance Co.*, 120 N. C. 141, 27 S. E. 39; *Annis-ton Nat. Bank v. School Committee of Durham*, 121 N. C. 109, 28 S. E. 134; *White v. Railroad*, 121 N. C. 484, 27 S. E. 1002. But this ruling is not before us for review. The defendant neither excepted nor appealed, and the plaintiff cannot except to this finding, because it is in his favor. And it seems to us that there can be no doubt but what the intestate of the plaintiff was also guilty of negligence, if the evidence be true, and every word of it believed. This issue is, then, not one that must be found by a jury, but one that may be found by the court. It does not present a question where reasonable men might put different constructions upon it, and come to the conclusion that the plaintiff's intestate was not guilty of negligence. If plaintiff's intestate was walking upon defendant's road, in open daylight, on a straight piece of road, where he could have seen defendant's train for 150 yards, and was run over and injured, he was guilty of negligence. And, although the defendant may have also been guilty of negligence in running its train at a greater rate of speed than was allowed by the town ordinance, or in not ringing its bell as required by said ordinance, and in not keeping a lookout by its engineer as it should have done, yet the injury would be attributed to the negligence of the plaintiff's intestate. It has been so held

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in *Meredith v. Railroad Co.*, 108 N. C. 616, 13 S. E. 137; *Norwood v. Railroad Co.*, 111 N. C. 236, 16 S. E. 4; *High v. Railroad Co.*, 112 N. C. 385, 17 S. E. 79. These cases hold that it is not negligence in a railroad company where its train runs over a man walking on the railroad track, apparently in possession of his faculties, and in the absence of any reason to suppose that he was not. This is put upon the ground that the engineer may reasonably suppose that the man will step off in time to prevent injury. In *McAdoo v. Railroad Co.*, 105 N. C. 140, 11 S. E. 316, this doctrine is expressly held; and it is further held in that case that, on account of plaintiff's negligence in standing on the road and allowing defendant's train to run over him, this was concurring negligence, and prevented him from recovering damages. *McAdoo v. Railroad Co.* has been cited and approved on this point in *Syme v. Railroad Co.*, 113 N. C. 565, 18 S. E. 114, and in *Smith v. Railroad Co.*, 114 N. C. 744, 19 S. E. 863, 923, 25 L. R. A. 287, and many other cases. We know that it has been held in many cases that a railroad company is liable for damages for carelessly and negligently running over and killing or injuring persons on its road, in which it appeared that the persons killed or injured were also guilty of negligence; and it may not be easy to distinguish some of these from the one under consideration. But there is a distinction, and a distinct line of decisions, as we have shown by the cases we have cited. The distinction does not seem to lie so much in the negligence of the parties, where both are guilty of negligence, as it does in the condition of the parties. And we think, upon examination, that it will be found that, where the company has been held liable, it is in cases where the party injured was not upon equal opportunities with the defendant to avoid the injury, and in cases where there was something suggesting to the defendant the injured party's disadvantage or disability; as where the party injured is lying on the railroad track, apparently drunk, or asleep, or on a bridge or trestle, where he could not escape, or could not do so without great danger. In such

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cases, if the engineer saw the party injured or by proper diligence should have seen him, the company is liable. It is in such cases as these that the doctrine of proximate cause, or the "last clear chance," is called in to determine the liability.

The doctrine of proximate cause—the "last clear chance"—is firmly established in this state, and we have no idea of abandoning or in any way disturbing it. We think the line of cases where it applies are distinct, and distinguishable from this case, whether we have succeeded in pointing out the distinction or not.

Contributory
Negligence—
Province of
Court.

Indeed, we do not understand the plaintiff to make this the principal ground upon which he rests his appeal and insists upon a new trial. Nor do we understand the plaintiff seriously to insist but what there is evidence tending to prove—if not to prove—that the plaintiff's intestate was guilty of negligence. But it is contended that if the intestate was guilty of negligence, the defendant being also guilty of negligence, the intestate's negligence was what is termed "contributory negligence," and that contributory negligence is an affirmative issue, and cannot be found by the court. To sustain this position, a number of recent cases have been cited; among them, *Spruill v. Insurance Co.* and *Anniston Nat. Bank v. School Committee of Durham*, *supra*. In these cases, and quite a number of others, it was held that the court could not find an affirmative issue. This holding was entirely correct in those cases and in every other case where it has been held, so far as we remember. We do not wish to overrule or disturb this doctrine, as held in those cases; but to our minds this case is clearly distinguishable from them, as we hope to be able to show. In those cases, and in all others, as we think, where this has been held, there was some doubtful or disputed fact to be found, dependent upon the weight or the credit of the evidence. In such cases the court cannot find the facts, nor even intimate an opinion, without violating the statute of 1796 (Code, § 413); and, if the court has done so in this

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case, the plaintiff is entitled to a new trial. But the function of the jury is to find the facts (this must mean disputed facts), and must be exercised where there is evidence proving or tending to prove the facts disputed. If there is not, it is the duty of the court to say so, and withdraw this dispute—this issue—from the jury. This was conceded by the plaintiff, it being a negative finding of the issue. But the plaintiff contends that to find the intestate guilty of negligence was an affirmative finding, and one the court could not find. This is logically and legally true if the court had to find any disputed fact where there was any evidence showing or tending to show the negative of the issue, or if it was necessary that he should pass upon the weight or credit of the evidence. Where this is the case, the usual rule is to submit the issue to the jury, with the instruction that, if they believe the evidence, they will find the issue yes or no, as the case may be. This is usually a good rule, and in many cases saves an appeal to this court. But the court could not do that in this case without impeaching the plaintiff's witnesses. All the evidence was offered by the plaintiff, and the defendant had demurred to it. This was an admission by the defendant that the evidence was true. The plaintiff, by offering the evidence, had vouched for its credit. He could not impeach its credit. As to the plaintiff, it stood unimpeached and unimpeachable. It is true that, if the plaintiff offered other evidence tending to show the facts different, then it would have become a matter for the jury as to which witness they would believe. But both witnesses stand alike credited, so far as the plaintiff or the party introducing them is concerned. If this evidence, or any part of it, had been introduced by the defendant, it would have been the duty of the court to submit it to the jury, because the plaintiff would not have been bound to give credit to the defendant's witnesses, and the defendant could not give them credit by demurring to their evidence. But when the plaintiff demurred to the plaintiff's evidence (and but one construction can reasonably

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be drawn from it; that is it could not reasonably mean different things), we cannot see why it did not become a question of law, as much so as if the facts stated in the evidence had been agreed to, as the facts in the case; and, if this is so, it certainly became a question of law for the court. This view of the case is sustained by *Williams v. Telegraph Co.*, 116 N. C. 556, 21 S. E. 298; *Hinshaw v. Railroad Co.*, 118 N. C. 1047, 24 S. E. 426; *Ice Mfg. Co. v. Raleigh & G. R. Co.*, 122 N. C. 881, 29 S. E. 575; *White v. Railroad Co.*, 121 N. C. 484, 27 S. E. 1002,—and we do not think it will be found to conflict with any opinion of this court. A number of cases may be found (some of which we have cited) in which it is said that the court cannot find an affirmative issue; and this is true in those cases, and in all cases where the court would have to find the facts to establish an affirmative issue. But in this case the court finds no facts. They are admitted by the demurrer of the defendant to the plaintiff's testimony. This being so, and the plaintiff's evidence clearly establishing the intestate's negligence, which was the concurrent cause of the injury, the plaintiff cannot recover, without overruling the authorities we have cited, and many others not cited. The doctrine of proximate cause and "the last clear chance" is not involved in this case. It falls under the doctrine announced in *McAdoo v. Railroad Co.*, *supra*, and that line of cases. Taking the view of the case we do, the judgment of the court below must be affirmed.

FAIRCLOTH, C. J. (concurring). When the plaintiff closed his evidence, defendant moved that plaintiff be nonsuited for the reason that upon his own evidence he was not entitled to recover. His honor was of opinion that the evidence, if believed, showed the defendant guilty of negligence; that the evidence, being that of the plaintiff, and without contradiction, must, as to the plaintiff, be believed, and, if believed, it showed that plaintiff's intestate, by his own negligence, contributed to cause the injury. The intestate was walking on the track of the defendant company when he was struck by the defendant's shifting engine and killed. At the time he

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was struck the intestate was walking along the track, in full possession of his senses, and in a place where he had a full view of the approaching engine for a long distance. The track was perfectly straight from the place where the intestate was struck by the engine to the crossing of the Southern Railway Company, a distance of 2 blocks and 225 feet, or 1,000 feet in round numbers; and there was no obstruction whatever to his view. There was a path running alongside of the track where plaintiff was walking at the time the engine struck him. Plaintiff's witness Sophia Lee testified that she saw the train, and heard it coming, and that plaintiff's intestate was between her and the train, walking right along the track on a clear day. Upon this evidence it appears to me that, assuming the defendant to have been negligent, the causation of the injury was the concurrent negligence of both parties, and it has often been held that in that event neither party can recover. In *McAdoo v. Railroad Co.*, 105 N. C. 140, 41 Am. & Eng. R. Cas. 524, 11 S. E. 316,—a case quite like the present,—the court held that "the plaintiff could not recover if the engineer and fireman, without actual knowledge of or acquaintance with him, had acted, as they did, on the assumption that intestate would get out of the way." "There was no error in the instruction predicated upon the supposition that they failed to ring the bell. According to the plaintiff's own testimony, he stood upon the track with his back towards the engine, and did not see it till after he was stricken by it. He was, therefore, in any aspect of the case, negligent, and the jury would not have been warranted in any finding that the defendant could have prevented the injury by using ordinary care." The court further says that it could make no difference at what rate of speed the engine was running at the time. "All this might possibly have been more clearly presented, if there had been a third issue, and his honor had said there was no testimony to support an affirmative finding on it." The principles stated and applied in *McAdoo's Case* have since been repeatedly affirmed by this court, and

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expressed in emphatic language. In *Meredith v. Railroad Co.*, 108 N. C. 616, 13 S. E. 137, the court said: "We concur with the judge below in the opinion that the plaintiff was not entitled to recover, because, by the undisputed facts, considered in any phase presented by them, the plaintiff was negligent in failing to see the train approaching him from behind, while the servant of the defendant was not in fault in acting on the belief that plaintiff would get out of the way of the engine before it would reach him." In *Norwood v. Railroad Co.*, 111 N. C. 236, 16 S. E. 4, this court decides: "If the engineer could, by proper watchfulness, have seen intestate standing or walking on the track, he would not have been negligent in acting on the assumption that intestate would step off in time to avert injury; and where the intestate was seen, or could, by proper care, have been seen, by the engineer, sitting upright on the end of a cross-tie, the latter was justified in believing that he would get out of danger; and his failure to leave the track, whether he was a trespasser or licensee, is considered by the law as the proximate cause of his death, unless it is shown that his condition or situation was such that he could not leave the track, and that this was known, or could, by the exercise of proper care, have been known, to the engineer." In *High v. Railroad Co.*, 112 N. C. 385, 17 S. E. 79, this court decides: "Where an engineer sees on the track, in front of the engine in which he is moving, a person walking or standing, whom he does not know at all, or who is known by him to be in full possession of his senses and faculties, the former is justified in assuming, up to the last moment, that the latter will step off the track in time to avoid injury; and, if such person is injured, the law imputes it to his own negligence, and holds the railroad company blameless." "The failure of the engineer to keep a proper lookout subjects the company to liability only in those cases where, if he had seen the situation of the injured party, it would have become his duty to pursue such a course of conduct as would have averted it. Whether he saw the plaintiff at a distance of 150 yards or of 10 feet,

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he was not at fault in acting on the supposition that she would still get out of the way. It is not material whether the train was moving fast or slow in such a case as this." "It the plaintiff had looked and listened for approaching trains, as a person using a track for a footway should, in the exercise of ordinary care, always do, she would have seen that the engine was moving towards her. The fact that it was a windy day, and that she was wearing a bonnet, or that the train was late, gave her no greater privilege than she would otherwise have enjoyed as licensee, but, on the contrary, should have made her more watchful." "There was nothing in the conduct or condition of the plaintiff that imposed upon the engineer, in determining what course he should pursue, the duty of departing from the usual rule that the servant of a railroad company is warranted in expecting licensees or trespassers, apparently sound in mind and in body, and in possession of their senses, to leave the track till it is too late to prevent a collision." In *Syme v. Railroad Co.*, 113 N. C. 558, 18 S. E. 114, this court decides: "When a person is injured while walking on a railroad track by an engine that he might have seen by looking, the law imputes the injury to his own negligence. There being no testimony tending to bring this case within any exception to the general rule, we are of the opinion that there was no evidence of the want of ordinary care on the part of the defendant, while, in any aspect of the case, the plaintiff's intestate was negligent in getting upon the track in front of the engine without looking, and in exposing his person to injury, when he might have seen that the engine was approaching, and have avoided the collision by stepping off the track." "On the other hand, the engineer was justified in assuming that the intestate had looked, and had notice of his approach, and would clear the track in ample time to save himself from harm." Other cases might be cited of the same purport.

The defendant's motion was, in effect, a demurrer to the plaintiff's evidence, admitting every word to be true, and every fact that can be gathered from it. I am unable to see

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what is left for the jury to pass upon. I understand that when facts are agreed upon, or found by a special verdict, or admitted by demurrer, nothing remains to be done, except for the court to apply and fit the law to the facts. Here the proximate cause of the injury is plainly and manifestly the joint, concurrent negligence of both parties, and there is no place found in these facts for what is called the "last clear chance." When the facts are clearly settled, from which only one inference can be drawn, the question is then one of law for the court to decide, and in such case the court should take the case from the jury, and direct a nonsuit or verdict, as the case may be. 1 Shear. & R. Neg. p. 68, § 56; Cooley, Torts, 670. That the causes of the injury are concurrent seems plain according to these facts. Possibly, some sort of logic might conclude differently, but that is not the common-sense view to my mind; and, when logic and common sense cannot be reconciled, logic must give way.

DOUGLAS, J. (dissenting). It is within a feeling of deep regret and much hesitation that I am forced to enter my most earnest dissent from the opinion of the court. I wish I could agree with the majority of the court that its opinion does not conflict with our former rulings, but I am utterly unable to do so with those cases before me. That plain words may have a hidden legal meaning utterly at variance with the ordinary usage of the language, and which I did not intend them to have, and never dreamed they could have, when I used them, is beyond my comprehension. Feeling as I do, I would be untrue to myself were I to concur in an opinion which, to my mind, destroys the principle of our recent decisions, is in direct violation of the statute, and flatly contravenes the letter and the spirit of the constitution. The rule as now laid down, stripped of its incidents, is as follows: "That the court may withdraw an issue from the jury, and direct an affirmative finding of contributory negligence against the plaintiff, whenever it thinks that the evidence of the plaintiff's own witnesses is sufficient to prove the fact in controversy." That is all there is in it,

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dilute it as we may. It is true the court says, "provided there is no conflict in the testimony," but such a want of conflict does not of itself prove the issue. There may be only one witness or fifty witnesses swearing to the same thing, and, unless they swear to enough to prove the fact in issue, neither the court nor the jury can find it to be true. This line of reasoning forces me to the conclusion which this court has recently so repeatedly and emphatically announced, but which it now seems at least partially to repudiate,—that the court can never direct an affirmative finding of fact. To do so, it would be necessary for the court to pass directly upon the weight of the evidence, and to find that it was of sufficient weight to overcome the negative presumption always arising from the burden of proof; in other words, it would be saying, in the teeth of the statute, that a fact which the law required to be proved had been "sufficiently proven." And yet MR. JUSTICE FURCHES, speaking for a unanimous court in *Anniston Nat. Bank v. School Committee of Durham*, 121 N. C. 109, 28 S. E. 134, says that this cannot be done, using the following words: "But no matter how *strong* and *uncontradicted* the evidence is in support of the issue, the court cannot withdraw such issue from the jury, and direct an affirmative finding. To do this is to violate the act of 1796 (section 413 of the Code)." In *White v. Railroad Co.*, 121 N. C. 484, 489, 27 S. E. 1002, the same justice, again speaking for a unanimous court, says: "The court can *never* find nor direct an affirmative finding of the jury. The most the court can do is to instruct the jury, where there is no conflict of evidence, that, if they believe the evidence, they should find yes or no, as the case may be." In *Wood v. Bartholomew*, 122 N. C. 177, 186, 29 S. E. 960, JUSTICE FURCHES, again speaking for a unanimous court, says: "The burden of the issue of contributory negligence is on the defendant. It is an affirmative issue, and cannot be found by the *court*. It must be determined by the *jury*." Other opinions of the same learned justice contain expressions to the same effect.

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The italics are my own. These emphatic expressions were neither casual nor obiter, but were used in the decision of questions directly raised, and in answer to the strenuous contentions of counsel urged in repeated and elaborate arguments. This court, at the last term, after most careful consideration, speaking without dissent through MR. JUSTICE MONTGOMERY, in *Crews v. Cantwell*, 125 N. C. 516, 519, 34 S. E. 688, after intimating that the burden was really on the defendant, uses the following language: "The instruction then of his honor was erroneous, for, as the burden of proof was assumed by the plaintiff, the court could not withdraw the issue from the jury. *Anniston Nat. Bank v. School Committee of Durham*, 121 N. C. 109, 28 S. E. 134. In that case JUSTICE FURCHES, delivering the opinion of the court, said: 'But, no matter how strong and uncontradictory the evidence is in support of the issue, the court cannot withdraw such issue from the jury, and direct an affirmative finding.'" It should be noted that in that case the court based its judgment solely upon the fact that the plaintiff had assumed the burden of proof, and made no allusion whatever to the fact that the only evidence was that of the plaintiff. MR. JUSTICE CLARK has used similar language in speaking for the court, and does not wish now either to modify or withdraw it.

I may be pardoned for citing some of the opinions of the court written by myself. They are in plain words, plainly setting forth the views I was known to possess and intended to express. Whatever other faults they may have, my opinions are neither the intangible mists of summer nor the shifting winds of March. In *Spruill v. Insurance Co.*, 120 N. C. 141, 27 S. E. 39, during my first term upon the bench, it is said for a unanimous court: "Where there is no evidence, or a mere scintilla of evidence, or the evidence is not sufficient, in a just and reasonable view of it, to warrant an inference of any fact in issue, the court should not leave the issue to be passed upon by the jury, but should direct a verdict against the party upon whom the burden of proof rests.

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That the verdict should be directed against the party upon whom rests the burden of proof is the essence of the rule. * * * If the verdict of a jury is in the opinion of the court against the weight of evidence, it can be set aside; and to the proper exercise of this discretion there can be no objection. But to permit the judge to pass upon the sufficiency of the evidence necessary to rebut a legal presumption without submission to the jury would infringe upon the exclusive powers of the jury. * * * The rule laid down in some authorities that, wherever the judge would be justified in setting aside the verdict as against the weight of evidence, he would be equally justified in taking the case from the jury and directing a verdict, cannot receive our sanction. It is not the law in North Carolina, and never can be under our present constitution. 'The ancient mode of trial by jury' guarantied by the constitution is that at common law, and is none the less the right of the citizen than it was of the subject. Direction of a verdict and granting a new trial are essentially different in nature and effect. The one regulates the trial by jury, the other denies it; the one recommits the case to the jury, the other takes it away completely; the one merely reopens the case for a fairer trial, while the other ends it without redress, save the precarious method of appeal, where findings of fact can be reviewed only from the meager notes of the judge and the uncertain recollection of counsel. The mere fact that the judge can never, save by waiver or consent, render a verdict, but can direct it only in the name of the jury, shows the intent and spirit of the law. These principles are 'fundamental,' and 'a frequent recurrence' thereto is of constitutional obligation." This case appears to have been cited in more than 20 different cases, including the opinion of the court from which I am respectfully dissenting. In *Cox v. Railroad Co.*, 123 N. C. 604, 12 Am. & Eng. R. Cas. 390, 31 S. E. 848, this court, in reviewing *Spruill's Case*, says: "Had the question not been again presented by counsel, it would almost seem needless to repeat,

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what we have so often said, that the burden of proving negligence rests upon the plaintiff, while the onus of showing contributory negligence rests upon the defendant. In both cases this must be shown by a greater weight of the evidence, and of this relative weight the jury alone can determine. A negative presumption necessarily accompanies the burden, and remains until the burden is lifted or shifted by direct admissions or a preponderance of proof. * * * Where there is evidence tending to prove negligence on the part of both parties, the case must always be submitted to the jury, and it makes no difference if this evidence appears in the testimony of the plaintiff. The court may say to the jury that there is no evidence tending to prove a fact, but it can never say that a fact is proved. * * * It is the settled rule of this court that a verdict can never be directed in favor of the party upon whom rests the burden of proof, who in all cases is considered to have the affirmative of the issue, whatever may be its form. Though this rule was discussed and reaffirmed in *Spruill v. Insurance Co.*, 120 N. C. 141, 27 S. E. 39, it did not have its origin in that case, but in *Wittkowsky v. Wasson*, 71 N. C. 451, where the doctrine was distinctly laid down in the following words, quoted from the opinion of WELLS, J., in the court of exchequer chamber: "There is in every case a preliminary question, which is one of law, *viz.* whether there is any evidence on which the jury could properly find the question for the party on whom the burden of proof lies. If there is not, the judge ought to withdraw the question from the jury, and direct a nonsuit, if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant." In other words, the verdict must, in either event, be directed against the party on whom lies the onus, and by necessary implication can never be directed in his favor. * * * The burden of proving contributory negligence is always upon the defendant. Therefore a direction in his favor, based in any degree upon the contributory negligence of the plaintiff, would be a direction in favor of the party upon whom rested the burden of proof,

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which is directly opposed to the uniform current of our decisions. If there had been any reasonable doubt that the burden of proving contributory negligence rested upon the defendant, it has been set at rest by chapter 33 of the Laws of 1887. * * * It therefore follows that on a motion for a nonsuit the court can consider only the evidence relating to the negligence of the defendant, and, if there is more than a scintilla tending to prove such negligence, the motion must be denied, and the case submitted to the jury." That case cites a large number of authorities, which it is needless now to recite. Can there be any question as to its meaning? There was a single dissent. In *Bolden v. Railway Co.*, 123 N. C. 614, 31 S. E. 851, this court, with a single dissent, says: "By force of statute, as well as a settled rule of decision, the plea of contributory negligence is an affirmative defense, in which the burden, both of allegation and proof, rests upon the defendant. It is true that contributory negligence may be shown by the evidence of the plaintiff, but whether the weight of that evidence is sufficient to overcome the presumption in his favor arising from the burden of proof is a question for the jury. The action of the plaintiff in going upon the bridge was argued as contributory negligence, but, if it be viewed as an implied assumption of risk, the same rule will apply. Both doctrines are alike as being in the nature of a plea of confession and avoidance, inasmuch as they are affirmative defenses set up to excuse the negligence of the defendant. As such, the burden of proof is in both cases upon the defendant, and an issue can be found in its favor only by a jury." In the subsequent case of *Cogdell v. Railroad Co.*, 124 N. C. 302, 32 S. E. 706, it is said by a unanimous court that: "Contributory negligence and assumption of risk, being in the nature of pleas in confession and avoidance, are affirmative defenses, and cannot be considered on a motion for nonsuit;" citing *Bolden v. Railway Co.*, *supra*. It is useless to further cite the large number of cases wherein this court has said that the court could never direct an affirmative finding. If it did not mean "never"

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when it said it in the above cases, I suppose it did not mean it in the others. I meant it then, and mean it now.

The rule now adopted by the court is an adaptation of the federal rule; and, while it may find a home with us by adoption, it is not to the manner born, and is the legitimate offspring neither of our constitution nor of our laws. The federal courts, as well as those of some few of the states, still adhere to the English practice of allowing the court to express an opinion upon the weight of the evidence; that is, the court, under this rule, may in all cases say to the jury what it thinks ought to be their verdict. This practice, which may serve to explain some decisions in those tribunals where it still exists, has been repudiated by a large majority of the states, and was positively prohibited by statute in this state as far back as 1796. This prohibition has been brought forward in successive compilations, and is still in force as section 413 of the Code, which reads as follows: "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon." This distinct line of demarkation between the powers of the judge and the jury, established in the childhood of our state, and remaining in full force for more than a hundred years, has become a fundamental part of "the law of the land." I am aware that there are some cases tending to sustain the rule now adopted by the court, but they were decided before I came upon the bench, and are in direct conflict with our later as well as our earlier decisions. The earliest case cited by the court is that of Meredith v. Railroad Co., 108 N. C. 616, 13 S. E. 137, decided in 1891, which cites upon this point only the cases of McAdoo, Parker, and Daily. In McAdoo's Case all the issues were submitted to the jury, and none found by the court. In Daily's Case (decided in 1890), 11 S. E. 320, while the court below held that the plaintiff, who was an

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idiot, could not recover, on account of his contributory negligence, this court held that there was no evidence tending to prove the negligence of the defendant. Parker's Case, 86 N. C. 221, was decided before the passage of the act of 1887 (chapter 33), which expressly provides "that in all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it shall be set up in the answer and proved on the trial." I am also aware that there have been two or three dicta to the same effect, but I do not feel bound by them. I am not responsible for all that may be said in an opinion from which I do not dissent, but only for such matters as are necessarily involved in the decision of the case. Dicta are the overflows of judicial learning, and, like the freshets in our streams, are always dangerous, and generally harmful. Occasionally they add fertility to the fair fields of jurisprudence, but more often they tend to cut gullies through well-established principles, or to create stagnant ponds of doubt whose mist and malaria are equally dangerous.

The tendency of judges to invade the province of the jury is shown throughout the entire history of the law, and the survival of the system in full vigor as the foundation stone of Anglo-American jurisprudence is in itself the strongest proof of its inherent merit. Courts of equity from the first refused to recognize the system, and we have recently seen to what extent a trial by jury can be evaded by proceedings in injunction and in the nature of contempt. Courts of admiralty, following the principles of the civil law, have also discarded the jury; and it is a significant fact that they also have refused to recognize the doctrine of contributory negligence, always apportioning the damages in proportion to the comparative negligence of the parties. In view of this tendency, this court has felt it its duty more than once to assert the independence of the jury. In *Cable v. Railway Co.*, 122 N. C. 892, 900, 29 S. E. 379, the court says: "This court does not favor the growing practice of taking cases from the jury. The jury is a constitutional body, as much so as

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the court itself, and in the exercise of its peculiar powers of equal responsibility and independence." In *State v. Shule*, 32 N. C. 153, the court says: "We think there was error in the mode of conducting the trial. * * * There was a departure from the established mode of proceeding, and the wisest policy is to check innovation at once; particularly as in this case it concerns the 'trial by jury' which the 'bill of rights' declares 'ought to remain sacred and inviolable.' This innovation is that, instead of permitting the jury to give their verdict, the court allows a verdict to be entered for them, such as it is to be presumed the court thinks they ought to render, and then they are asked if any of them disagree to it; thus making a verdict for them, unless they are bold enough to stand out against a plain intimation of the opinion of the court." The court then proceeds to lay down the rule substantially as stated in *Spruill v. Insurance Co.*, *supra*. In *State v. Allen*, 48 N. C. 257, 262, JUDGE PEARSON, speaking for the court, says: "It is our duty to see to it that the trial by jury shall remain 'sacred and inviolable,' and if, upon the circuits, there has grown up any practice encroaching upon the trial by jury as 'heretofore used,' although such practice may, to some extent, have been sanctioned by decisions of this court, it is our duty to put a stop to it; and, while we will not allow a jury to encroach upon the province of the judge,—*i. e.* to declare and explain the law, and undertake, by an abuse of their power, to decide questions of law,—on the other hand, we are equally solicitous to see that the court shall not commit usurpation upon 'the true office and province of the jury.' Repetition of error can never justify the violation of a positive enactment of a statute, much less the infringement of a fundamental principle upon which our social existence is declared to rest. An error may have crept into our practice by reason of the judges not having attached due importance to the distinction between the condition of things in England, whence we are in the habit of taking our notions of law, and the condition of things here, where the trial by jury is protected

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both by the constitution and by legislative enactment. A judge is not at liberty to express an opinion as to the sufficiency of the evidence. When there is a defect, or entire absence of evidence, it is his duty so to instruct the jury; but, if there be any competent evidence, relevant and tending to prove the matter in issue, it is 'the true office and province of the jury' to pass upon it, although the evidence may be so slight that any one will exclaim, 'Certainly no jury will find the fact upon such insufficient evidence.' Still the judge has no right to put his opinion in the way of the free action of the jury, even should he deem it necessary to do so, in order to prevent them from being misled by the arguments of counsel or their own want of apprehension. It is true, juries will sometimes find strange verdicts, acting under the influence of ignorance or of prejudice, but in general juries are honest, and it is considered safer for the lives and property of the people to submit to the inconvenience of particular cases of this kind than in any wise to allow the judge to encroach upon 'the true office and province of the jury.' This partial evil is in a great measure obviated by allowing the judge to grant a new trial in all cases (except where a party is acquitted upon a criminal charge) whenever he thinks the jury have found against the weight of the evidence." I have no apology to make for quoting so much of this opinion. It is a great opinion of a great judge, fully equal in importance to that of *Hoke v. Henderson*, about which we have recently heard so much. I have given to the latter opinion the deliberate assent of my judgment and my conscience, and have carried it to its fullest legitimate extent. In doing so I have nothing to retract, but I feel equally bound by the underlying principles of *State v. Allen*. Are the constitutional rights of the officeholder any more sacred than the constitutional guaranties of the citizen? I think not. I understand the opinion of the court to admit that there is sufficient evidence tending to prove the negligence of the defendant, and to base its judgment purely upon the contributory negligence of the plaintiff, which it

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presumes to have been shown beyond the possibility of a reasonable doubt. That driving a train at a greater rate of speed than that allowed by law is at least evidence of negligence is well settled. In *Railway Co. v. Ives*, 144 U. S. 418, 12 Sup. Ct. 683, 36 L. Ed. 489, the court says: "Indeed, it has been held in many cases that the running of railroad trains within the limits of a city at a rate of speed greater than is allowed by an ordinance of such city is negligence *per se* [citing authorities]. But perhaps the better and more generally accepted rule is that such an act on the part of the railroad company is always to be considered by the jury as at least a circumstance from which negligence may be inferred, in determining whether the company was or was not guilty of negligence." The opinion of the court disposes of the case at bar in the following words: "And it seems to us that there can be no doubt but what the intestate of the plaintiff was also guilty of negligence if the evidence be true, and every word of it believed. This issue is, then, not one that must be found by a jury, but one that may be found by the court. It does not present a question where reasonable men might put different constructions upon it, and come to the conclusion that the plaintiff's intestate was not guilty of negligence." By this I presume the court means that the negligence of the deceased was the ultimate proximate cause. This remarkable finding, coupled with the unqualified assertion that no reasonable man can put a different construction upon it, becomes still more remarkable in view of the fact that two members of this court have put a different construction upon it. This exquisite but unconscious satire upon the rule itself well illustrates its inherent fallacy. I do not mean to be flippant, or to treat the opinion of the court with any disrespect, but surely it is a legitimate argument to show that it necessarily involves a *reductio ad absurdum*. If reasonable men cannot take a different view of this matter, it follows that the two judges who have taken a different view of it cannot be considered as reasonable men. But suppose two other judges should in some other

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case have the misfortune to differ from a majority of the court as to the effect of the evidence, they also would come under the ban. This would leave the remaining member of the court far above his associates upon the lonely pedestal of solitary infallibility. Suppose he, too, should fall from his high estate, what would become of the court? And yet this court must say that a reasonable man can draw but one conclusion from the evidence, or the case must go to the jury. Why not let it go to the jury, as was said in *Allen's Case* should be done, in all cases of doubt? The court is not only putting itself in the place of the jury, but is deciding the case by a majority verdict.

Another exceedingly able and interesting opinion is the dissenting opinion of JUSTICE BYNUM in *Wittkowsky v. Wasson*, 71 N. C., on page 458. The present attitude of the court renders that opinion almost prophetic. The opinion of the court in the case at bar says that the evidence introduced by the plaintiff must be taken as true, as far as he is concerned. This absolutely reverses the reason of the rule. A party is estopped from impeaching the credibility of his witnesses, but not from denying the correctness of their statements. Moreover, much of the evidence was brought out by the defendant on cross-examination. On a motion for nonsuit, the defendant admits the truth of the plaintiff's evidence, which must be construed in the light most favorable to the plaintiff. So construing the evidence, can any one say that, if the engine had been going at not more than four miles an hour,—the maximum speed allowed by the ordinance,—the engineer could not have stopped in time to prevent the killing? As the intestate was going in the same direction, if he were walking at the rate of three miles an hour, the train would have gained on him only one mile in an hour. The intestate is presumed to have known the law, and he had a right to assume that the defendant would obey the law. He had a right to presume that the defendant would give him the ordinary signals required by law, and would not run him down, and crush the life out of

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him, without giving him some slight warning. Surely, a human life is still worth something,—the pulling of a bell cord, the opening of a whistle. We are constantly told that we should be shocked at the excessive verdicts of juries. That is often the case, but there are other things which also touch my judicial sensibility. A human form mangled beyond recognition, and an immortal spirit hurled into eternity without a moment's warning, are a greater shock to the instructed conscience of a Christian age than any verdict rendering merely pecuniary damages. This may be called merementality. Be it so. I can never hope to attain that high plane of judicial temperament where I shall be entirely free from human sympathy. In addition to the weight of reason and authority in favor of drawing the line at affirmative verdicts, another advantage is that it is a natural boundary, seen and known of all men. Where the dividing line between great principles is marked by nothing more substantial than stakes, which can easily be put down, and as easily pulled up and moved, the principles themselves are in imminent danger. I deeply feel the importance of this decision, and may overestimate its danger. I hope I do, but it seems to me to involve ultimate results far-reaching and dangerous in their nature. With such strong convictions and sincere apprehensions, I cannot afford to cast away the moorings of the past, and turn my opinions loose to float without chart or compass, the aimless driftwood of a shoreless sea.

CLARK, J. (dissenting). The jury system, whatever its defects, is the best which the wisdom of the ages has yet evolved for the ascertainment of the truth of disputed issues of fact. It is the bulwark of the liberty and the rights of the citizen. The line between the province of the court and of the jury was distinctly run and marked by our ancestors in the act of 1796 (now Code, § 413). BYNUM, J., in *Wittkowsky v. Wasson*, 71 N. C. 458, ably and prophetically pointed out the evils of the judiciary passing beyond that line and invading the province of the jury as the sole triors of the facts. It is to be deeply regretted that his views did not then prevail.

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It is a still further invasion of the province of the jury, and contrary to a long line of the decisions of this court (as MR. JUSTICE DOUGLAS has shown), to permit a judge to direct an affirmative finding, which is nothing less than the court passing upon the evidence and holding that a fact is sufficiently proved. It is the province of the jury to disbelieve uncontradicted evidence if they attach no faith to the witnesses. If there is no evidence in support of the party having the burden of proof upon an issue, the judge may direct a negative finding for its absence; or, if the uncontradicted evidence is in support of the contention of the party having the burden of proof, the court may tell the jury, "if they believe the evidence," to find in favor of that side; but the judge cannot, even in such case, direct an affirmative finding, for that is to pass upon the credibility of the witnesses and the weight of the evidence, which the jury alone is authorized to do.

CONNORS

v.

CHICAGO & N. W. RY. CO.

(*Supreme Court of Iowa, May 15, 1900.*)

Fires Caused "by Operating" Railroad—Statute.*—A fire caused by a railroad's sectionmen in burning the grass and weeds along its right of way, is not a fire "set out or caused by operating" its railway, within the meaning of the statute of Iowa providing that the fact of damage to property along a railroad right of way by reason of a fire set out or caused by the operation of the railroad shall be *prima facie* evidence of negligence on the part of the railroad.

APPEAL by defendant from Kossuth county district court.
Reversed.

Hubbard, Dawley & Wheeler, for appellant.

Clarke & Cohenour and *F. M. Miles*, for appellee.

*See monographic note, 15 Am. & Eng. R. Cas., N. S., 495 *et seq.*

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LADD, J. The fire which destroyed the plaintiff's hay and injured his slough originated from a fire set out by the defendant's sectionmen in burning the grass and weeds along its right of way, or else from a cinder pile dumped from a threshing engine previously operated on the premises. In either event, recovery could only be had from the party at fault on an affirmative showing of negligence. This is conceded, unless it may be said that the fire was "set out or caused by operating" the defendant's railway. See *Gandy v. Railroad Co.*, 30 Iowa 420. If so done, then, under section 1289 of the Code of 1873, the burden of proof was upon the defendant to show the exercise of care on the part of its employees. *Small v. Railway Co.*, 50 Iowa 338; *Rose v. Railway Co.*, 72 Iowa 625, 34 N. W. 450; *Engle v. Railway Co.*, 77 Iowa 666, 37 N. W. 6, 42 N. W. 512; *Metzgar v. Railway Co.*, 76 Iowa 387, 41 N. W. 49. The important inquiry, then, is, what is meant by "operating a railway"? In none of the cases heretofore determined has the application of the statute gone beyond a fire set out or caused by an engine on the track. But under the co-employees' act (Code, § 2071), allowing recovery by an employee injured by negligence "in any manner connected with the use and operation of any railway on or about which they shall be employed," the clause "use and operation of any railway" has been frequently considered and defined. Thus, in *Stroble v. Railway Co.*, 70 Iowa 560, 31 N. W. 63, the court, through BECK, J., said: "What is the use and operation of a railway? It is constructed for the sole purpose of the movement of trains. That is its sole use. What is the operation of a railway? They can be operated in no other way than by the movement of trains." In *Nelson v. Railway Co.*, 73 Iowa 576, 35 N. W. 611, the movement of steam ditching machines, and in *Larson v. Railway Co.*, 91 Iowa 81, 58 N. W. 1076, that of a hand car, were held to be operating a railway. In *Akeson v. Railway Co.*, 106 Iowa 64, 75 N. W. 676, after reviewing the authorities, the court concluded that: "The only dangers

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peculiar to railroading are those occasioned by the movement of the engines, cars, and machinery on the track, or directly connected therewith. It is evident that the statute contemplates such injuries only as are caused by the negligent acts of employees so engaged. In no other proper sense is a railway used and operated. * * * If, then, the injury is received by an employee whose work exposes him to the hazards of moving trains, cars, engines, or machinery on the track, and is caused by the negligence of a co employee in the actual movement thereof, or in any manner directly connected therewith, the statute applies, and recovery may be had. Beyond this the statute affords no protection." Appellee relies somewhat on the language employed in *Haden v. Railway Co.*, 92 Iowa 229, 60 N. W. 537. There the employee whose negligence caused the injury was conceded to be engaged in the use and operation of a railroad, as it was occasioned by the movement of a train in his charge. The inquiry made in the second paragraph of that opinion related to the exposure of plaintiff to the peculiar hazards of railroading, and what was said must be construed with reference to that subject. *Haden* was held to have been so exposed, and, having been found to belong to this class, it was quite immaterial whether he was also connected with the use and operation of the road. It may be remarked, however, that an employee, "in keeping in repair the track of a railroad for the present operation of its trains," while he may be exposed to the hazards, is not engaged "in the business of operating a railroad." Such work is undoubtedly necessary therefor, but not in any way connected therewith. We are content with the conclusion reached in *Akeson's Case*,—that a railroad is only operated, within the meaning of the law, by "moving trains, cars, engines, or machinery on the track." The same definition is peculiarly applicable to the clause "operating any such railway," contained in the statute relating to fires. Locomotives, trains, or machinery passing along the tracks are entirely within the control of the company, and are usually beyond easy reach before the dam-

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ages caused by escaping sparks or fire can be known. To obviate the all but insurmountable obstacles in the way of the injured party adducing affirmative proof of its negligence in order to recover, this statute, casting the burden of proving care on the railway, was enacted. It is limited to a situation, however, peculiar to railroads (*i. e.* their operation); otherwise, it might fall beneath the denunciation of the constitution, as class legislation. For discrimination by the legislature must rest upon some apparent natural reason, "suggested by a difference in situation and circumstances of the subjects placed in different classes, as suggests the necessity or propriety of different legislation with respect to them." The evidence is quite as available in the case of a fire set out by the sectionmen on the right of way as when started by a neighboring farmer or other person, and we can think of no reason for applying a rule in the one case which does not obtain with equal propriety in the other. See 3 Elliott, R. R. § 1242. It follows that the court erred in directing the jury that, if the damages were caused by fire set out by defendant's sectionmen on the right of way, the plaintiff had made a *prima facie* case, and that thereupon the burden was on the defendant to show its freedom from negligence in allowing the fire to escape, and in failing to put it out. Reversed.

HYGIENIC PLATE-ICE MFG. CO.

v.

RALEIGH & AUGUSTA AIR-LINE R. Co.

(*Supreme Court of North Carolina, June 5, 1900.*)

Fires Set by Locomotives—Evidence of Other Fires.—In an action for damage caused by a certain locomotive, evidence of fires at various times, and at other places, caused by sparks from other locomotives of defendant, was incompetent, as it did not tend to prove that the damage was caused by such locomotive.

*See monographic note, 15 Am. & Eng. R. Cas., N. S., 495 *et seq.*

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APPEAL by defendant from Wake county superior court.
Reversed.

MacRae & Day, J. D. Shaw, J. B. Batchelor, W. H. Neal, G. F. MacRae, and R. T. Gray, for appellant.

Ernest Haywood, and F. H. Busbee, Simmons, Pou & Ward, and Armistead Jones, for appellee.

FAIRCLOTH, C. J. This is an action for damages to plaintiff's property alleged to have been caused by defendant's negligence. The trial resulted in a verdict and judgment in favor of the plaintiff, and an appeal by defendant. For the purposes of this opinion, the facts are as follows: The plaintiff's ice factory was located on the defendant's right of way, two or three hundred yards west of the Union Depot, in the city of Raleigh. On August 29, 1893, between 8 and 9 o'clock,—about 8:30,—the plaintiff's ice factory was discovered to be on fire, and was partially consumed. About 20 minutes before the fire the defendant's engine No. 228, called the "Atlanta Special," pulled out from the Union Station, going west, and passed the plaintiff's factory, emitting sparks, and soon thereafter the factory was discovered to be burning. The plaintiff alleged and proved the passing of said engine and fire at the time above stated, and there is no allegation or proof in the record that any other engine of the defendant passed by said place recently before or soon after the time the fire occurred. Carefully reading the record shows clearly that the contention at the trial centered on the question whether the damage was caused by said engine No. 228.

There was much evidence and many exceptions to the admission and exclusion of evidence and to instructions given to the jury by the court. During the trial the plaintiff offered, and was allowed, over the defendant's objection, to introduce the evidence of several witnesses to show that at several times, both before and after this fire, and at other places on defendant's line, other engines of defendant had, by sparks emitted, set fire to and burned the property of

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other persons; one witness testifying that it was a common occurrence for these trains to set the fields on fire, but he did not know whether it was done by the defendant's trains, it being proved that at those points another railroad runs parallel with, and in a few feet of, the defendant's track. This testimony was heard by the jury without any evidence of the condition of these engines, and without any explanation of the attending circumstances. Another witness said that in 1894 the remains of said factory building caught on fire directly after the defendant's freight train passed, and constantly before and since, and that the old field caught on fire in March, 1894, two or three times, near the bridge. This evidence of fires at various times, and at other places, caused by sparks from other engines, both before and after August 29th, we must hold to be incompetent, as it does not tend to prove the condition of engine No. 228, nor to throw any light on the question directly before the jury. It was well calculated to divert the minds of the jury, and lead them to an unsafe verdict. The principle which governs in such cases was brought to the attention of the court in February, 1891, in the case of *Grant v. Railroad Co.*, 108 N. C. 462, 470, 13 S. E. 209. The plaintiff was injured by derailment of defendant's train, and on the trial he offered to show that a similar accident occurred soon before and afterwards at other places, to a train run by the same engineer and conductor. The court said: "The condition of the defendant's railroad track at places other than that at which the accident in question happened could not prove or disprove the condition of the track at the latter place," and that such evidence would certainly tend to mislead the jury. In October, 1891, the same question was before the court in Pennsylvania, and is on "all fours" with the case before us. It was *Henderson v. Railroad Co.*, 144 Pa. St. 461, 22 Atl. 851, 16 L. R. A. 299. After able and elaborate arguments, the court held: "(1) In an action for a loss by fire, caused by sparks from a locomotive engine of a railroad company, the burden is on the plaintiff to prove

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that the fire was communicated by some engine of the defendant company, and also to prove negligence in the construction or management of the engine. Such facts, however, may be established by circumstantial evidence. (2) When the fire is shown to have been caused, or, in the nature of the case, could only have been caused, by sparks from an engine which is known and identified, the evidence should be confined to the condition, management, and practical operation of that engine, and testimony tending to prove defects in other engines of the company is irrelevant and inadmissible. (3) If, however, the offending engine is not clearly or satisfactorily identified, it is competent for the plaintiff to prove, in support of the allegation that the fire was caused by the defendant's negligence, that the defendant's locomotives generally, or many of them, at or about the time of the occurrence, threw sparks of unusual size, causing numerous fires on that part of its road. (4) This class of testimony is exceptional in character at the best, and is admissible only because direct evidence is impracticable. The examination, therefore, will be confined to the negligent operation of the engines at and about the time of the fire, with such reasonable latitude, before and after the occurrence, as is sufficient to make such proofs practicable." We have quoted freely from this case, because it covers several practical points of this subject, and because it seems unnecessary to cite other cases of a similar bearing. The principle is not only supported by authority, but it appears to our minds to be correct, and a just rule to be applied in jury trials. There are some decisions modifying this rule, and perhaps seem inconsistent with it; but the reasoning in some of them is not satisfactory, and we do not cite or discuss them. What we have said shows error, and requires a new trial. At the next trial it is probable that many of the other exceptions will be eliminated, and we will not, therefore, discuss them at present. *Venire de novo*.

DOUGLAS, J. (dissenting). I cannot concur in the judg-

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ment or opinion of the court. The only ground for granting a new trial appears to be the admission of testimony as to the condition of other engines. Under the circumstances of this case, I am inclined to think that the admission of such testimony was competent in any view, but, whether this is so or not, it is clearly admissible in rebuttal of the defendant's evidence. The defendant had previously introduced Parish, foreman of its roundhouse, who testified, on direct examination, that he did not remember anything about the particular time of the fire or the particular engine, but that he did not permit any engine to go out of the roundhouse without being in thorough repair. The object of his testimony clearly was to prove that this particular engine, of which he had no recollection, must have been in good repair at that time, because all the engines were constantly kept in repair. The plaintiff simply answered this by showing that the other engines were not always kept in perfect repair, because they had set fire to property in such a way as could not have happened if they had been equipped with spark arresters such as described by the defendant's witnesses. Such evidence was strictly in rebuttal. But it may be said that the plaintiff's counsel, on the cross-examination of Nowell, a witness for the defendant, asked him about some engines that had been burned, and thus opened the door to the defendant. It seems a very little crack to open so wide a door. But, admitting it to be so, the defendant did not shut the door, but opened it still wider. If it was left wide open by the defendant, why could not the plaintiff enter? But another view suggested itself. In *Neal v. Railroad Co.* (at this term) 36 S. E. 117, this court has held, in effect, that all the testimony of the plaintiff's witnesses, whether given on direct or cross-examination, is the plaintiff's testimony. Why is it not so as to the defendant?

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PITTSBURG, C., C. & ST. L. RY. CO.

v.

INDIANA HORSESHOE CO.

(*Supreme Court of Indiana, March 13, 1900.*)

Appeal—Review.—The motion to make each paragraph of the complaint more specific, and the ruling of the court thereon, must be made part of the record, in order that the question of the correctness of the ruling may be presented for consideration on appeal.

Fire Spreading from Combustibles on Right of Way—Liability.*—Where a railroad company sets fire to the dry grass and other combustible materials which it has negligently suffered to accumulate on its right of way, and, without fault of the adjoining land owner, permits such fire to escape to his lands and burn his property, the company is liable, whether such fire was started negligently or otherwise.

Same—Construction of Contract for Use of Siding.—Under the contract in question, plaintiff was not required to keep defendant's siding, extending from its main track to plaintiff's factory, free from combustible matter, but only, when using the siding for the convenience of the factory, to keep it free from obstructions, such as cars, likely to cause accidents and interfere with defendant's use of the siding.

Same—Negligence—Quantity of Combustibles and Length of Time.—It is negligence in a railroad to suffer sufficient highly combustible matter to cause a continuous fire to spread across a considerable portion of its right of way to adjoining premises to remain on the right of way for two weeks.

Same—Negligence in Suffering Fire to Escape—Knowledge of Fire.—The special verdict showed that the railroad had knowledge of such an accumulation of combustible matter upon its right of way, adjacent to plaintiff's factory, and that there had been very dry weather for more than two months, and that the natural sequence of igniting such matter was the destruction of the building by the fire so started; and that the railroad did nothing to prevent the escape of the fire, which was such a fire, or its spread to the factory,

*See monographic note, 15 Am. & Eng. R. Cas., N. S., 495 *et seq.*

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which was thereby destroyed. *Held*, that the railroad's knowledge of the fire was sufficiently shown to establish its negligence in failing to prevent the escape of the fire from the right of way.

Same—Sufficiency of Findings.—The special verdict sufficiently showed the place where the fire started.

Same—Contributory Negligence—Duty to Guard against Negligence.—A person erecting a building on land adjoining a railroad track is not required to keep his property in such a condition as to guard against the negligence of the railroad with respect to fires, nor to maintain a guard over it continually to protect it against such negligence, but he has the right to construct buildings on any part of his land, and enjoy the same, without any regard to the proximity of the railroad.

Same—Evidence.—It is not required that the fact that a fire was started on a right of way by sparks from a passing engine, and that the railroad was negligent in permitting its escape from the right of way should be shown by direct evidence; and such facts were sufficiently shown in the case at bar by circumstantial evidence.

Same—Evidence of Other Fires.—Evidence as to other fires being set by other engines of defendant near the time of the fire in question near the same place was admissible as tending to show the degree of care required of the railroad in keeping the right of way at such point free from combustibles, and its knowledge of the condition of the right of way at such point.

Value of Property—Evidence.—Defendant's objection that plaintiff's witness was allowed to testify as to the value of the property destroyed as an entirety, while such property was sued for in separate items, was without foundation.

Appeal—Review.—Motions and rulings thereon not made a part of the record by a bill of exception or order of court present no question on appeal.

APPEAL by defendant from Wabash county circuit court.
Affirmed.

Samuel Parker and *N. O. & G. E. Ross*, for appellant.

Sayre, Slick & Hunter and *H. J. Paulus*, for appellee.

MONKS, J. This action was brought by appellee against appellant to recover the value of a building, machinery, tools, and materials alleged to have been destroyed by fire through the negligence of appellant. Issue, trial, special verdict under the act of 1895, and judgment for appellee. The errors assigned, and not waived, are:

Case Stated.

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"(1) The court erred in overruling appellant's motion to require appellee to make each paragraph of the complaint more specific, definite, and certain; (2) the court erred in overruling appellant's demurrer to the first paragraph of the complaint; (3) the court erred in overruling appellant's demurrer to the third paragraph of the complaint; (4) the court erred in overruling appellant's motion for a judgment in its favor over the special verdict; (5) the court erred in overruling appellant's motion for a new trial."

As the motion to make each paragraph of the complaint more specific, definite, and certain, and the ruling of the court thereon, are not made a part of the record by a bill of exceptions or order of court, no question is presented by the record for our consideration. Appeal—Review. City of Seymour v. Cummins, 119 Ind. 148, 150, 21 N. E. 549, 5 L. R. A. 126; Boyce v. Graham, 91 Ind. 420, 421; Manufacturing Co. v. Millican, 87 Ind. 87, 89; Insurance Co. v. Doll, 80 Ind. 113, 115; Ewbank, Ind. App. Proc. § 26.

All the paragraphs of the complaint were withdrawn, except the first and third. The allegations in said first and third paragraphs concerning appellant's negligence are substantially the same as the complaint in Railway Co. v. Hart, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549, which was held good. Fire Spreading from Combustibles on Right of Way—Liability. Under the law as declared in that case and the cases therein cited, each of said paragraphs was sufficient to withstand the demurrer for want of facts. The court did not err, therefore, in overruling the demurrer thereto.

There was no error in sustaining appellee's demurrer to the second paragraph of answer. The facts alleged in the first and third paragraphs of complaint show that the roadbed, tracks, and siding were under the exclusive control, use, management, and possession of appellant as a part of its right of way, and that appellant on the 22d day of August, 1895, and for a long time before that day, negligently suffered and caused the same to be covered over with dry weeds, grass, straw, paper, wood, Same—Construction of Contract for Use of Siding.

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and other rubbish adjacent to and adjoining the land on which appellee's factory and building were located. The theory of said second paragraph of answer to said paragraphs was that appellee was not entitled to recover because in the written contract entered into between appellant and appellee, by which appellant was to and did build a siding or switch from its main track to appellee's factory, appellee agreed to look after and keep it clean, and that it was negligent in permitting paper, weeds, and other combustible matter to accumulate thereon, and that the fire dropped from appellant's engine, started there, and spread therefrom to the factory. The part of said written contract which bears upon the question involved reads as follows: "The second party [appellee] agrees to exercise the greatest care in the management of the siding herein provided for; to prevent cars or other obstructions from getting out upon, or too close to, the main or other tracks; to secure the safe closing and locking of the main switch or switches, and to keep the inner safety switch (where such switch is provided) in proper position; also to use such means and care generally as will tend to avoid accidents of any kind." It was expressly provided in said contract that appellant should have the right to use without cost the whole or any part of said switch in connection with other business than that of appellee, provided such use did not interfere with the business of appellee. The whole of said siding, including the part upon appellee's lot, was built by, and to be kept in repair by, appellant, and was the property of appellant, with the right to enter and remove the same upon notice. It is evident that the part of said contract included in quotation marks did not require appellee to keep appellant's right of way and tracks adjacent to appellee's lot upon which said factory was constructed free from and clear of combustible material such as described in the complaint. Said provision was made with reference to appellee's duties when using said siding for the convenience of its factory in receiving and shipping goods, and such duties were confined to the cars and other obstructions upon the switch for the transaction of that

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business, and the exercise of due care to avoid accidents of any kind arising from said use of the switch by appellee, and it was not its duty to give any attention or care to the right of way, track, or switch of appellant. Counsel for appellant calls attention to a clause in said contract in regard to appellee's duty in erecting buildings, and claims that appellee violated the same, but, as no breach thereof is alleged in said second paragraph of answer, we are not required to consider said clause.

It is next insisted that the facts found in the special verdict do not show that the injury and loss sued for occurred on account of the negligence of appellant, and without the fault of appellee. The substance of the facts found bearing upon this question is as follows: That on and prior to August 22, 1895, appellee owned a factory building on lot 18, in Tibbett's addition to the city of Marion, Ind., which was constructed of wood; said lot being 140 feet long north and south, and 72 feet wide, east and west, and abutted upon the north side of appellant's right of way. That on and prior to said day the appellant used and occupied a strip of ground about $7\frac{1}{2}$ feet wide off of the south end of appellee's said lot for its spur and part of its right of way. That from the center of appellant's main track to the north side of its said spur was about $47\frac{1}{2}$ feet. That on and prior to said day the appellant had charge and control of the right of way upon and along which its railroad ran through the city of Marion, and also had charge and control of the numerous switches and side tracks upon and along its said right of way through said city, and that said switches and side tracks extended east and west along the north and south sides of its main track, and from a point west of appellee's said lot to a point east thereof several hundred yards. That about three years prior to said day the appellant constructed said spur track upon and across said strip of ground off of the south end of said lot, and that during all of said time the same was used and maintained by appellant as a part of its right of way, as a place for storing its cars when not in

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use; and that all said switches and side tracks, including said spur, during all said time, were in common use by appellant for handling and storing its trains and cars; and that said strip of ground was in the exclusive occupancy and control of appellant. That appellee's said building was 69 feet wide from east to west, and the south end of said building was about 5 feet north of the north rail of said spur; and appellee maintained a wooden porch against and across the south end of said building, which was about 3 feet wide. That on and prior to said day, appellant, at the point where appellee's factory was located, and extending east and west thereof, maintained and used its main track, two side tracks south of said main track, one side track north of its said main track, and the spur track north of said north side track, and leading to and along said porch of appellee's factory. That on said day the appellant's right of way opposite appellee's factory, from its north line to a point about three feet north of the north rail of its north side track, and for a distance of several feet east and west of appellee's lot, was covered with dry, combustible, and inflammable material, to wit, grass, weeds, straw, paper, shavings and wood, railroad ties, and other timber. That said weeds and grass were cut about two weeks before the 22d day of August, 1895, by appellant's servants and employees, and were left lying upon and along said right of way at the place named. That a large portion of said paper and straw was so upon said right of way by having been thrown or dropped from appellant's cars. That said combustible and inflammable matter had accumulated upon said right of way at least two weeks before said 22d day of August, 1895, and the employees of appellant upon whom rested the duty by their employment to remove from said right of way all such combustible matter and material during said summer of 1895, passed over said right of way at said point almost daily. That during the months of June, July, and August, 1895, the weather was very dry, and during said time said combustible matter became and was very dry, and highly inflammable, and was at all times during

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its existence there exposed to and in danger of ignition from appellant's engines; and was of such a character that a fire started therein would follow the same, and burn across the said switches to appellee's factory building. That the tracks and spur hereinbefore described constituted appellant's railroad yard at Marion, and appellee's factory was located on the north side and about the center of said yard; and appellant on and before said day kept a suitable engine at said city of Marion, and then had the same in daily use upon said tracks in said yard for shifting and handling its trains and cars. That on and prior to said day appellant was operating trains of cars over its said tracks and through said yards, averaging about one train each hour in each direction during the day, and in approaching and passing appellee's factory the engines drawing said trains used a great amount of steam. That on said 22d day of August, 1895, one of appellant's cars was standing on said spur track at a point thereon and adjacent to and just south of appellee's said building. That the doors of said car were open on both sides, and that in said car there was a considerable quantity of dry, combustible paper. That on said day, between the hours of 9 and 10 o'clock a. m., said dry and combustible material on appellant's right of way at said point was ignited and set to burning at a point southwest of said buildings by fire emitted from appellant's locomotive engines then and there operated by appellant along and upon its said main track. That on said day, at and during the fire, the wind was blowing from the southwest to the northeast. That said fire traveled continuously through said combustible material to the north side of said right of way, and ignited into flames said car so standing upon said spur, and was communicated to and into appellee's said porch and building. That said fire, from where the same was so set on said right of way, was a continuous fire until it reached over the intervening space to and into appellee's said building; and that from the point on said right of way where it began it continued to spread and burn through said combustible

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material on said right of way until it reached appellee's building, and said building was then and there rapidly destroyed and consumed by said fire. That nothing was done by the appellant to prevent it from being communicated to appellee's building. That the spreading of said fire to and into said building was the natural sequence of setting the same at said time and place. That at said point on said right of way where said fire began the appellant carelessly suffered and permitted such an accumulation of rubbish on its right of way that the escape of fire started therein from said, right of way was the ordinary and natural sequence; that all of appellee's officers and representatives were away from said factory when the fire was communicated to it, and had no knowledge or information of the fire until it was too late for them to save any of the property. That some of appellee's officers knew on said day, and prior thereto, of the existence of said combustible material along said spur and on the right of way. That said fire was started between 9 and 10 o'clock a. m., but the train the engine that set the fire was drawing was unknown. Appellant insists that the special verdict is not sufficient, because there is no finding as to the amount and extent of the grass, weeds, straw, and other combustible material permitted to accumulate and remain on the right of way, nor that permitting said combustible material to remain there for two weeks was unnecessary, or increased the hazards to appellee's property. This contention of appellant is fully answered by what was said in *Railway Co. v. Hadley*, 12 Ind. App. 516, 522, 523, 40 N. E. 760: "Counsel insists that the finding that dry grass and other combustible matter were negligently suffered to accumulate on the right of way is a finding of a conclusion, and not of a fact, unless it were shown also what was the quantity of such combustible material that was suffered to accumulate. Granting that counsel are correct in this position also, we think the quantity is sufficiently stated. If there was sufficient of such combustible matter to cover

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the ground on the right of way from within eight feet of the north side of the track continuously up to and adjoining the appellee's premises, and if, for the length of time stated, and in its highly inflammable condition, the material was suffered to remain there without any attempt to remove the same, the appellant was guilty of actionable negligence if injury resulted. * * * If the appellant suffered enough of the inflammable material to accumulate to cover the ground for the time and over that portion of the track and right of way described in the verdict, the presence of the objectionable material in sufficient quantities to cause the fire to spread to appellee's premises is sufficiently established."

It is next insisted by appellant that the facts found do not show that appellant knew of the existence of the fire, and that without such knowledge it could not be guilty of negligence in permitting the fire to escape; that the duty of appellant to use reasonable precaution to prevent the escape of fire does not arise until it has knowledge of the existence thereof. The

Same—Negli-
gence in Suffering
Fire to Escape—
Knowledge of
Fire.

special verdict shows that appellant had knowledge of the accumulation of the combustible material upon its right of way adjacent to appellee's factory, and that the weather was very dry for the period of more than two months before said fire, and said combustible matter was highly inflammable; and that the natural sequence of igniting said combustible material was its spread by the burning of said material to appellee's factory, and the destruction thereof by the fire so communicated; and that appellant did nothing to prevent the escape of said fire from the right of way or the spread of said fire to said factory. Appellant was required, under such circumstances, conditions, and surroundings of its right of way adjacent to appellee's factory,—environments created by itself,—to prevent the escape of fire from the limits of its right of way. *Railway Co. v. Overman*, 110 Ind. 538, 541, 542, 10 N. E. 575; *Railway Co. v. Trapp*, 4 Ind. App. 69, 30 N. E. 812; *Railway Co. v. Hadley*, 12 Ind. App. 516, 523, 40 N. E. 760. As was said in *Railway Co. v. Hadley*, *supra*

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representatives of appellee had no knowledge of said fire until too late for them to save any of the property; and, although some of them knew of the existence of the combustible material on the right of way, yet, under the authorities above cited, they were not required to guard and continually watch the factory, nor to remove the rubbish from appellant's right of way. They had the right to assume that appellant would perform the legal duties resting upon it. *Tien v. Railway Co.*, 15 Ind. App. 304, 44 N. E. 45, and cases above cited. As was said in *Tien v. Railway Co.*, *supra*: "The landowner is not required to live upon his premises, and keep a vigilant outlook for possible negligence upon the part of others, nor is he required to hire guards for that purpose. He is not bound to anticipate that another will be derelict in his duty towards him. He may rely upon the presumption that such person will conform to the legal duties resting upon him. *Railroad Co. v. Kern*, 9 Ind. App. 505, 36 N. E. 381; *Same v. Smith*, 6 Ind. App. 262, 33 N. E. 241; *Railway Co. v. Jones*, 86 Ind. 496." It follows, therefore, that the special verdict is not open to the objection urged by appellant.

Appellant insists that the evidence does not show that the fire started on its right of way from sparks or coals emitted from its passing engines, and that appellant was negligent in permitting the fire to escape from its right of way. Appellee was not required to prove such facts by direct evidence. They may be established by either direct or circumstantial evidence, or by both. *Railway Co. v. Stevens*, 87 Ind. 198; *Same v. Krenning*, 87 Ind. 351; *Same v. McCorkle*, 12 Ind. App. 691, 40 N. E. 26; *Railroad Co. v. Walsh*, 11 Ind. App. 13, 17, 18, 38 N. E. 534; *Railway Co. v. Trapp*, 4 Ind. App. 69, 73, 30 N. E. 812; 3 Elliott, R. R. § 1244, p. 1943. No witness testified that he saw a spark or coal pass from appellant's engine to the combustible rubbish on the right of way, yet the evidence fully justified the inference drawn by the jury that the fire was so started. The evidence, direct and circumstantial,

Same—Evidence.

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shows that appellant permitted combustible rubbish to accumulate on its right of way adjacent to appellee's factory, and remain there for a period of more than two weeks, in the month of August, 1895; that the weather was very dry during that summer, and the rubbish became and was very dry and inflammable, and was exposed to ignition, and in danger of being set on fire by sparks and coals from appellant's engines, which passed that point many times each day; that there was an up-grade near said point for about a mile, and appellant's engines in passing appellee's factory put on steam to increase the speed so as to carry them over the grade, and this caused great quantities of sparks and coals to be emitted from the engines while passing said factory; that the rubbish on appellant's right of way had been frequently ignited by fire from appellant's engines at points within a short distance east of appellee's factory prior to and on the day it was burned; that said combustible rubbish on appellant's right of way was ignited by fire from appellant's engines, and the wind on said day and at said time was blowing from the southwest to the northeast, and therefore spread through the rubbish, in the direction the wind was going, to appellee's factory, and destroyed it; that appellant did nothing to prevent the escape of said fire from its right of way, or the spread thereof to said factory. The evidence in regard to the accumulation of rubbish, the dry weather, the up-grade, the exertions of the engines in drawing the trains up the same, and the consequent throwing of sparks and coals of fire, the frequent ignition of the combustible material on the right of way by fire emitted from said engines before said fire, and other surroundings and conditions of which appellant was bound to take notice, and of which said evidence proved it had actual notice, was sufficient to authorize the jury to find that the natural and probable consequence thereof was that said combustible material on said right of way would be set on fire by sparks and coals from said engines, and that said fire would spread and escape, through the medium thereof, from said right of way to the

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adjoining land, and destroy the property thereon, and that appellant, in the exercise of ordinary care, should have foreseen such consequences and made proper provision to prevent the same. If such was the natural and probable consequences of operating appellant's railroad at said point on account of the surroundings and conditions, and in the exercise of ordinary care it should have foreseen the same, its failure to prevent the escape of fire from its right of way, and the consequent destruction of appellee's property, was negligence. *Railway Co. v. Overman*, 110 Ind. 538, 541, 10 N. E. 575; *Railway Co. v. Trapp*, 4 Ind. App. 69, 30 N. E. 812; *Railway Co. v. Hadley*, 12 Ind. App. 516, 523, 40 N. E. 760. The evidence was sufficient to authorize the jury to find facts showing that appellant was guilty of negligence in permitting said combustible rubbish to accumulate and remain upon its right of way adjoining appellee's factory, and that it was guilty of negligence in permitting the fire to escape from its right of way to appellee's factory. 3 Elliott, R. R. § 1226, and authorities next before those last cited. What we have said in regard to the facts found in the special verdict being sufficient to support the judgment rendered thereon, and the authorities there cited, fully sustains the conclusion that the evidence was sufficient to sustain the facts found in the special verdict.

Appellee was permitted to introduce testimony in regard to the fires being set by engines of appellant near the time of the fire in question, and on the right of way near the same place. Appellant insists that this evidence was not proper for any purpose, for the reason that the theory of each paragraph of complaint was, not that the fire was the result of the careless and negligent construction or operation of appellant's engines but its negligence in allowing the accumulation of combustible rubbish upon its right of way, and permitting the fire communicated thereto by its engines to escape to appellee's premises, and destroy the factory. The theory of the third paragraph of complaint is correctly stated by appellant, and it is unnecessary for us to determine whether or not its

Same—Evidence
of Other Fires.

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theory of the first paragraph is correct, for the reason that the special verdict finds no facts concerning any defects in the construction, or negligence in the operating or management, of appellant's engines. The facts found by the jury, therefore, show that, even if it was error to admit such testimony, said error was harmless. Said evidence was proper, however, for the jury to consider, in connection with all the other evidence in the cause, in determining the degree of care required of appellant in keeping its right of way free from combustible material at that point. Railroad companies are required to exercise due care to keep their right of way free from combustible material, and the degree of care to be exercised depends upon the surroundings. It was not only proper, therefore, for appellee to show that appellant had allowed combustible material to accumulate and remain on its right of way, that there was an up-grade on appellant's road near said factory, and the exertions required of engines in drawing trains of cars up and over the same, and that sparks and coals were emitted from the engines approaching and passing appellee's factory on account of the engines being taxed to their full capacity to pass up said grade, but also said sparks and coals ignited the combustible material on said right of way. Such evidence not only showed that combustible matter, if allowed to accumulate on appellant's right of way, at or near said factory, was in much greater danger of being set on fire by sparks and coals from engines on account of the conditions and surroundings, but that the same was actually set on fire by sparks and coals from said engines. Under such circumstances, the degree of care required of appellant would be much greater than under different conditions and surroundings. While appellant was bound to take notice of these conditions, and that combustible rubbish had been set on fire by sparks and coals from its engines, and use proper care in proportion to the danger to prevent the fire from spreading beyond the right of way to the adjacent land, and knowledge thereof will be presumed, yet it was proper to prove, as was done by the evidence, that

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it had actual notice and knowledge thereof. It follows that the evidence was properly admitted.

It is next insisted that the court erred in permitting appellee to prove by a witness, over appellant's objection, that the property destroyed by fire had a special and peculiar value as a manufacturing plant. Said witness was asked by counsel for appellee to "state what, in your judgment, that factory building, horse-shoes, machinery, and material were worth just before the fire,—the manufacturing plant." This question was objected to by appellant, "for the reason that the property sued for is sued for in separate items, and not as a plant." This objection was overruled, and appellant excepted. The witness answered, "About \$12,000." The question was as to the value of said property destroyed as an entirety, and the court committed no error in permitting the witness to answer the same. Moreover, the facts found in the special verdict show that the jury only assessed appellee's damages at the market value of the property destroyed.

It is assigned as one of the causes for a new trial that the court erred in overruling appellant's motion, made after the jury returned into court their special verdict, and before they were discharged, to require the jury to return to their room, and make more specific their answers to each of the interrogatories 151, 173, and 177. If such motion was made, it is not shown by any entry copied in the transcript. The only statement in regard to a motion to make the answers to the interrogatories named more specific is contained in the motion for a new trial. Said motion to require the jury to make their answers to said interrogatories more specific, and the ruling of the court thereon, were not made a part of the record by assigning said ruling as a cause for a new trial, but could only be made a part of the record by a bill of exceptions or order of court. No question is presented, therefore, by said cause for a new trial. Finding no available error in the record, the judgment is affirmed.

Value of Prop-
erty—Evidence.

Appeal—Review.

Baltimore & O. R. Co. v. Kreager

BALTIMORE & O. R. CO.

v.

KREAGER *et al.*

CLEVELAND, L. & W. RY. CO. v. RINGLEY. LAKE ERIE &
W. R. CO. v. FALK *et al.*

(*Supreme Court of Ohio, Dec. 19, 1899.*)

Fires Started on Right of Way—Statute Creating Absolute Liability—Negligence—Pleading—Evidence.—The act of April 26, 1894 (91 Ohio Laws, p. 187), imposes upon every railroad company operating a railroad or part thereof in this state an absolute liability for loss or damage by fire, originating on its land, caused by operating the road, and the fact that the fire originated on the land of the company is made *prima facie* evidence that it was caused by operating the road. In an action for such loss or damage, it is not necessary to allege or prove negligence on the part of the company, nor is the absence of such negligence a defense.

Fires Started on Adjacent Land—Statute—Liability—Negligence—Evidence—Pleading.—A different rule of liability and of evidence is provided by the act, where the loss or damage is caused by fire originating on land adjacent to the land of the railroad company. In such cases the company is liable only when the fire was caused in whole or in part by sparks from an engine on or passing over the road, and the fact that the fire was so caused is made *prima facie* evidence of negligence on the part of the company or person operating the road. But this *prima facie* case of negligence may be overcome by proof, under a proper pleading, that the company exercised due care, the burden being on the company to show that it was free from negligence.

Same—Negligence—Pleading.—A petition which alleges that the plaintiff's loss was caused by fire that originated on land adjacent to the land of the railroad company, and that the fire was caused in whole or in part by sparks from an engine upon or passing over the railroad while the defendant was operating it, is not subject to demurrer on the ground that it fails to charge the defendant with negligence. Though it does not in terms charge such negligence, it states facts which in law make a *prima facie* case of negligence, and shows a complete cause of action.

Baltimore & O. R. Co. v. Kreager

Constitutionality of Statute—Attorneys' Fees as Costs.*—These provisions of the statute are constitutional. They neither impair the obligation of contracts, nor deprive railroad companies of property without due process of law, nor deny them the equal protection of the law, and they have uniform operation throughout the state. Whether section 3 of the act, which provides for taxing as part of the costs an attorney's fee for the successful party on appeal, is constitutional, *quære*. But, if not, it is severable from the remaining provisions, and does not affect their validity.

Application of Statute.—The statute is applicable where the railroad company obtained its right of way or part of it by deed, as well as when it was acquired by legal appropriation, and to companies in existence when the statute was passed as well as to those organized since.

(Syllabus by the Court.)

ERROR by defendants to Muskingum, Stark, and Hancock counties circuit court. *Affirmed*.

J. H. Collins and *F. A. Durbin*, for plaintiff in error Baltimore & O. R. Co.

J. M. Lessick, *Austin Lynch*, and *Willison & Day*, for plaintiff in error Cleveland, L. & W. R. Co.

John B. Cockrum, *Jason Blackford*, and *A. Blackford*, for plaintiff in error Lake Erie & W. R. Co.

Ball & Swingle and *C. T. Marshall*, for defendants in error Kreager and others.

R. W. McCaughey and *Thayer*, *Webber & Turner*, for defendant in error Ringley.

John Poe, for defendants in error Falk and others.

WILLIAMS, J. The actions below were brought by the respective defendants in error to recover damages to their property by fire caused, it is alleged, in the operation by the plaintiffs in error of their railroads after
Case Stated. April 26, 1894. In the first and last of the cases the fire that caused the damages sued for originated on the lands of the railroad company, and was thence com-

*As to the constitutionality of statutes making a railroad an insurer against fires caused by the operation of its road, see *St. Louis & S. F. R. Co. v. Mathews* (U. S.), 6 Am. & Eng. R. Cas., N. S., 361, and *note*, 389 *et seq.*

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municated directly to the property of the plaintiffs. The court, in each of these cases, declined to instruct the jury that negligence of the company was necessary to a recovery by the plaintiff, and charged that, as the fire originated on the company's land, the plaintiff might recover the loss he thereby sustained, without proof of negligence on the part of the company, if the fire was caused in its operation of the road. In the other case the fire did not originate on the company's land, but was caused, it is claimed, by sparks which were blown from an engine passing along the defendant's road, over onto the plaintiff's buildings, situated on his own land. The petition contains no charge of negligence, and a demurrer to it on that ground was overruled. The court also refused to give in its charge to the jury instruction hereinafter mentioned, which the defendant requested. In each of the cases damages were recovered, and judgment therefor was affirmed; and, as in the disposition of the cases it becomes necessary to consider and determine like questions concerning the construction and constitutionality of the same statute, they were here argued and submitted together, and may be conveniently included in one report.

The statute in question is entitled "An act making railroad companies liable for loss or damage by fire in certain cases and prescribing a rule of evidence in certain cases," and was passed and took effect April 26, 1894 (91 Ohio Laws, p. 187). Its provisions are as follows:

"Section 1. That every railroad company operating a railroad, or any part of a railroad, wholly or partially within the state of Ohio, shall be liable for all loss or damage by fire originating upon the land belonging to such railroad company, caused by operating such railroad. Such railroad company shall be further liable for all loss or damage by fires originating on lands adjacent to such railroad company's land, caused in whole or in part by sparks from an engine passing over the line of such railroad, to be recovered before any court of competent jurisdiction within the county in

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which the lands on which such loss or damage occur are situated, and the existence of such fires upon such railroad company's lands shall be *prima facie* evidence that such fire was caused by operating such railroad.

"Sec. 2. That in all actions against any person or incorporated company for the recovery of damages on account of any injury to any property, whether real or personal, occasioned by fire communicated by any locomotive engine, while upon or passing along any railroad in this state, the fact that such fire was so communicated shall be taken as *prima facie* evidence to charge with negligence the corporation, or person or persons who shall, at the time of such injury by fire, be in the use and occupation of such railroad, either as owners, lessees or mortgagees, and also those who shall at such time have the care and management of such engine; and it shall not, in any case, be considered as negligence on the part of the owner or occupant of the property injured, that he has used the same in the manner, or permitted the same to be used or remained, had no railroad passed through or near the property so injured, except in cases of injury to personal property, which shall be at the time upon the property occupied by such railroad.

"Sec. 3. In case either party appeal from the judgment of the court in which an action under this act is originally begun, or may carry the case to a higher court on error, the party in whose favor judgment is finally rendered shall have included in his bill of costs against the adverse party an attorney fee of fifty dollars (\$50) in case the appeal or error is not carried beyond the circuit court, and in case such appeal or error is carried to the supreme court of this state, there shall be an attorney fee of one hundred dollars (\$100) included in his said bill of costs.

"Sec. 4. Section two of this act shall apply to all cases now pending, as well as to those hereafter to be commenced."

The question upon which counsel differ in the construction of the statute is whether the liability created by it is

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Fires Started on
Right of Way—
Statute Creating
Absolute Liability—
Negligence—
Pleading—Evi-
dence.

absolute, in the sense that negligence of the defendant is unnecessary to a right of action under it. Without attempting a critical analysis of the statute, it is reasonably clear, we think, that it deals with two distinct classes of cases, and prescribes a rule of evidence, and of liability in each, different from the other. One class embraces all cases where the loss or damage is caused by fire originating on the lands of the company operating the railroad. In cases of that class the company is made liable, when the fire is caused in operating the railroad, though the company be entirely free from negligence, and the existence of the fire on the company's lands is made *prima facie* evidence that it was caused in operating the road. The facts essential to a right of action in a case of this kind are (1) that the plaintiff's loss resulted from a fire which originated on the land of the defendant company, and (2) that the fire was caused in operating the railroad. But, when the first of these facts is admitted or proved, the last is *prima facie* established also, and the burden is then upon the defendant to show that the fire was not caused in operating its road. And, while it is unquestionably competent for the defendant to put in issue either or both of these material facts, it is no defense that the company used due care in operating its road, and was otherwise free from negligence. A sufficient reason, if that was necessary, for imposing the rule of absolute liability which renders negligence of the railroad company or its freedom from negligence immaterial, may be found in the fact that such company, having complete control of its right of way, may readily keep it clear of combustible substances, from which, if allowed to remain, there is, in the operation of the road, constant and imminent danger of fires which others cannot prevent, and against which they may be unable to protect themselves.

Cases of the other class provided for by the statute are those where the loss or damage occurs from fire which originates on land adjacent to that of the railroad com-

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pany, and is caused, in whole or in part, by sparks from an engine passing over the line of railway. Actions of this kind may be maintained against the company or person operating the road, either as owner, lessee, or mortgagee, and proof of the fact that the fire which caused the plaintiff's loss was communicated by an engine while upon or passing along the railroad, it is declared by the statute, "shall be taken as *prima facie* evidence to charge with negligence the corporation or person or persons who shall, at the time of such injury by fire, be in the use and occupation of such railroad." This provision of the statute would obviously become inoperative, and without a purpose, if it should be held that negligence of the defendant, as an element in cases of this kind, is wholly eliminated, and a rule of absolute liability applied, which will not permit the absence of negligence to be shown in defense; for, as in all cases merely *prima facie* evidence may be overcome by superior proof to the contrary, the plain import of this provision of the statute allows the defendant to disprove the *prima facie* case of negligence by proof of due care. The facts necessary for the plaintiff to establish in the first instance, if they are denied, are (1) that his loss occurred from fire that originated on land adjacent to the land of the railroad company; and (2) that the fire was caused, in whole or in part, by sparks from an engine upon, or passing over or along, the railroad while the defendant was operating it, or was in its use and occupation as owner, lessee, or mortgagee. When these facts are not in issue, or are proved, the plaintiff is entitled to recover unless the defendant shows affirmatively that he was without any negligence that proximately contributed to the loss; and, as they make a case for the plaintiff which places the burden on the defendant of proving his freedom from such negligence, a petition which contains those facts is not obnoxious to a general demurrer. Such a petition, though it does not in terms charge the defendant with negligence, states facts which in law make a *prima facie* case of negli-

Fires Started on
Adjacent Land—
Statute—Liability
—Negligence—
Evidence—
Pleading.

Same—Negli-
gence—Pleading.

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gence, and shows a complete cause of action. And it would seem to follow that, if the defendant relies on the absence of negligence on his part as a defense, he should plead it by answer.

The statute, so interpreted, is assailed as a violation of both the federal and the state constitutions. The specific grounds on which its constitutionality is contested are that (1) it impairs the obligation of contracts; (2) it deprives railroad companies of their property without due process of law; (3) it denies them the equal protection of the law; and (4) it has not uniform operation throughout the state.

The validity of legislation of this nature, so far as it was supposed to conflict with the federal constitution, has been recently considered by the supreme court of the United States in the case of *Railway Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611, where, in an opinion of great research, MR. JUSTICE GRAY reviews the history of the law

*Constitutionality
of Statute—Attor-
neys' Fees as
Costs.*

relating to the liability of persons for fire originating on their own premises, and the adjudications on that subject in England and this country, and answers and refutes all of the above-mentioned objections, except the last one, to statutes of this character. The grounds on which the exercise of the legislative power in the enactment of such statutes is sustained, as announced in many cases, are concisely stated in the opinion of the learned justice as follows: "The motives which have induced, and the reasons which justify, the legislation now in question, may be summed up thus: Fire, while necessary for many uses of civilized man, is a dangerous, volatile, and destructive element, which often escapes in the form of sparks, capable of being wafted afar through the air, and of destroying any combustible property on which they fall, and which, when it has once gained headway, can hardly be arrested or controlled. Railroad corporations, in order the better to carry out the public object of their creation, the sure and prompt transportation of passengers and goods, have been authorized by statute to

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use locomotive engines, propelled by steam generated by fires lighted upon those engines. It is within the authority of the legislature to make adequate provision for protecting the property of others against loss or injury from sparks from such engines. The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company, which employs the implements and creates the peril for its own profit, rather than upon the owner of the property, who has no control over, or interest in, those instruments." And he concludes: "The statute is a constitutional and valid exercise of the legislative power of the state, and applies to all railroad corporations alike. Consequently, it neither violates any contract between the state and the railroad company, nor deprives the company of its property without due process of law, nor yet denies to it the equal protection of the laws."

The application of the principle underlying such legislation is not affected by the fact that it does or does not expressly authorize the railroad company to insure property along the line of its road against fire caused in the operation of the road. Whether provision of that kind shall or shall not be made rests in the legislative discretion, and may involve other considerations. In *Rodemacher v. Railway Co.*, 41 Iowa 297, a statute which enacted that "any corporation operating a railway shall be liable for all damages by fire that is set out or caused by the operating of any such railway," without any provision authorizing the company to take insurance against loss by such fires, was held constitu-

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tional; and that case is approvingly cited, and quotations made from the opinion by MR. JUSTICE GRAY in the case referred to in 165 U. S. 1-16, 17 Sup. Ct. 243, 41 L. Ed. 611. And, in other cases there so cited, no notice is taken of, or importance attached to, the presence or absence of any provision for insurance. In *Martin v. Railroad Co.*, 62 Conn. 331, 25 Atl. 239, the court said: "The reasons underlying the legislation are not hard to find. The railroad companies were in possession of great powers and privileges granted by the state. The use of such powers was necessarily attended with danger to property along the line of the road, and fires were of frequent occurrence. The legislature rightly judged that it was hard for individuals to bear all these losses, and that the railroad companies might well be required to make them good. Nor is such a requirement unjust. On the contrary, it is substantially right and just. Railroad companies possess extensive powers and valuable franchises, by means of which they are able to collect large sums of money from the public. In using such powers and franchises, they necessarily expose private property. They have a license from the public to carry on extensively dangerous business, from which they receive large profits. Why should they not be required to assume the risk rather than individuals?"

In many of the states, and probably a majority of them, statutes have been adopted not materially different from the one we have before us, so far as the questions under consideration are concerned; and MR. JUSTICE GRAY, in his opinion on page 22 of the case in 165 U. S., page 251, 17 Sup. Ct., and page 619, 41 L. Ed., says: "The learning and diligence of counsel have failed to discover an instance in which a statute making railroad companies absolutely liable for damages by fire communicated from their locomotive engines to the property of others has been adjudged to be unconstitutional as to companies incorporated before or since its enactment."

The contract which it is claimed is impaired by the statute

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is that of the state with the railroad company, arising from the charter granted by the former to the latter. The contention is that as by its incorporation the company obtained the right to use locomotive engines propelled by steam in the operation of its road, without liability for damages by fires caused thereby, except where they resulted from the company's negligence, there was an implied agreement that the state would impose upon the company no greater burden in that respect, which agreement is impaired and violated by the statute because it imposes a greater liability. And on the same ground is based the claim that the statute deprives the company of its property without due process of law, in that a defense which it might formerly make in actions for such damages is wholly or partially taken away. In the Baltimore & Ohio Company's case the further claim is made that, as the company's right of way on which the fire originated that caused the damages for which the plaintiff sued was obtained by deed, which conveyed the strip of land for all lawful uses of the railroad, one of which was the moving of locomotive engines along and over the road without liability for fires that did not result from its negligence, the statute, in creating a liability where there is no negligence on the part of the company, impairs its contract with the grantor in the deed. It does not appear that the conveyance was other than the usual grant of a right of way for railroad purposes, nor that there was any covenant running with the land by which a successor to the title of the grantor in the adjacent land would be bound, nor that there was any special covenant in the deed which would estop the owner of the adjacent land from asserting any right he might otherwise have under the statute, so that the rights acquired by the deed are not materially different from those obtained by the appropriation of a right of way for a railroad.

It seems clear that this statute does not impair any charter obligation of the state. Since the constitution of 1851, the only charters of railroad or other private corporations are the general laws of the state which permit their creation,

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grant their franchises, define their powers, and regulate their conduct; and these laws, under power expressly reserved in the constitution, the general assembly may at any time alter or repeal. Such corporations, therefore, receive their existence, and hold their franchises, subject to the right of the legislative body, in the exercise of its reserved power, to impose upon them such new duties and obligations, conditions and regulations, from time to time, as the public welfare may seem to require. The charter of a corporation is no longer a contract of the state, unalterable without the consent of the corporation. This view of the subject may not be important, since, as was held in *Railway Co. v. Mathews*, *supra*, and cases there cited, statutes which impose upon railroad companies an absolute liability, where before they were liable only when negligent, are not subject to the objection that they impair the obligation of contracts, though the power to alter or amend the charter of the company by legislation is not reserved in the constitution of the state. And such statutes are sustained when applicable to corporations created before as well as after their passage, and when the right of way of the company was acquired by deed as well as when acquired by appropriation. It was held in *Lyman v. Railroad Corp.*, 4 Cush. 290, where DEWEY, J., said: "It is contended, however, that the provisions of this statute do not apply to a case like the present, where the title of the plaintiff is derived from one who has himself, by his deed, granted the land embraced within the location of the railroad, and by the very terms of the grant has conveyed it for the purpose of being thus used for a railroad. The argument is that the grantor having thus granted a certain definite parcel of land for the purpose of a railroad, out of a much larger parcel retained by him, the grant is subject to all the consequences necessarily attendant upon such a use of the same, and particularly such as would result from the running of engines, and the exposure of property in his adjacent land to such injury and loss as would naturally result therefrom, and that

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the railroad corporation, while in the exercise of their appropriate business, are only responsible for ordinary care and diligence in the manner of using their road. It is not contended that the statute was not intended to embrace the case of those whose land has been taken under the provisions of the charter of the railroad, but the argument assumes a distinction between those who convey the right to appropriate a portion of their land to the proprietors of a railroad by deed and those who do no other act than suffer their land to be taken by such proprietors, under their authority to enter upon and take land for the purpose of their road, paying therefor such damages as the county commissioners or a jury shall award. We can perceive of no sound distinction between the cases supposed. Each of these modes of acquiring the necessary real estate for the purpose of a railroad is authorized, both by the general laws and by the acts creating railroad corporations. In each the landowner is supposed to receive full satisfaction for all the injuries necessarily resulting from the use of the same for a railroad. But with the use of locomotive engines greater hazard to contiguous buildings and property owned by the adjacent landowners may arise than was originally contemplated, or ought to be left to the ordinary common-law remedies. We consider this provision of the statute of 1840, c. 85, as one of those general remedial acts passed for the more effectual protection of property against the hazards to which it has become subject by the introduction of the locomotive engine. The right to use the parcel of land appropriated to a railroad does not deprive the legislature of the power to enact such regulations, and impose such liabilities for injuries suffered from the mode of using the road, as the occasion and circumstances may reasonably justify. These provisions in the act referred to are of general import, and equally embrace the cases of those who have by deed granted to a railroad corporation the right to enter upon and use their land, or have given a title to the land itself, included within the location, and those other persons whose land has been taken and held merely by

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the force of the location of the railroad under the charter authority." This case was approved and followed in *Pierce v. Railroad Co.*, 105 Mass. 199.

Certainly, unless there was some agreement or covenant in the grant of the right of way which would bind a subsequent purchaser from the grantor of the remainder of the land, the enforcement of the statute by such purchaser for damages to his buildings or property, caused by fire originating on the right of way, could not amount to the impairment of the company's contract with the grantor. In the absence of such agreement or covenant, so far as the purchaser is concerned, the company acquired no greater or different right under its grant than if the right of way had been obtained by legal appropriation.

If the statute is otherwise valid, there appears to be no substantial foundation for the claim of counsel that in its enforcement the railroad company is deprived of its property without due process of law, since the remedy it gives must be prosecuted in a court of competent jurisdiction, as actions are usually prosecuted. The plaintiff must file a petition containing a statement of the facts necessary to make a case against the company under the statute, proper process must be served, and the defendant allowed its day in court. It is entitled to plead, have process for witnesses, and to a trial with all the rights incident thereto that parties have in other like cases, including the right to have any judgment recovered against it reviewed in the appellate courts upon the same terms that remedy is allowed to other parties.

The basis of the contention that the statute denies to railroad companies the equal protection of the law is that it subjects them to a different and more onerous rule of liability than is imposed on other corporations and individuals using steam engines similarly constructed and operated, such as steamboat, manufacturing, and other like companies. This proposition has been advanced in many of the reported cases where the validity of such a statute was involved, and has been uniformly held untenable, upon what appears to be a

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substantial and sufficient ground, which is clearly stated in the case of *Grissell v. Railroad Co.*, 54 Conn. 447, 32 Am. & Eng. R. Cas. 349, 9 Atl. 137, where the court says: "There is no force in the objection that the statute under consideration unjustly selects only railroad corporations to bear the burden of an extraordinary risk. It is confined to them because they alone have the privilege of taking a narrow strip of land from each owner, without his consent, along the route selected for the track, and of traversing the same at all hours of the day and night, and at all seasons, whether wet or dry, with locomotive engines that scatter fire along the margin of the land not taken, thereby subjecting all combustible property to extraordinary hazard of loss, and that, too, for the sole profit of the corporation. The argument for the defendant is fallacious in erroneously assuming that the statute denies to the defendant a good defense, which at common law all others would have under similar circumstances." This view of the question is fully sustained by the supreme court of the United States in *Railway Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107, where that court upheld the constitutionality of a statute of Kansas imposing for the future, upon every railroad corporation organized or doing business in that state, a liability to which no person or corporation was before subject, for all damages done to any of its employees by the negligence or mismanagement of their fellow servants. The court said: "The hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the

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same liabilities shall be applied to carriers by canal and stage coaches and to persons and corporations using steam in manufactories."

Considerations of this nature are equally applicable to, and seem no less decisive of, the objection that this statute is without uniform operation throughout the state. As has been already observed, railroad companies are unlike other corporations with respect to the character of their franchises, the nature and manner of carrying on their business, and the use of the agencies necessarily employed, and the danger from fires in the use of these agencies is more imminent, extensive, and constant. And, since the statute is applicable to all railroad companies in the state, it operates uniformly throughout the state on all corporations of the same general class.

Whether any of the provisions of the statute are inapplicable to receivers operating railroads is a question upon which we deem it necessary to express an opinion at this time. If they are not applicable, it must be because a receiver operating a road under the orders of a court occupies an exceptional position, and, if so, the validity of the statute is unaffected. In determining that question, the consideration of other legislation may become important.

Nor do we find it necessary to decide whether the third section of the act, which provides for taxing, as part of the costs, and attorney's fee for the successful party on appeal, is valid or not. No fee was allowed by the courts below, and none is claimed here. And, if that section should be held unconstitutional, it is distinct and severable from the other provisions of the act, and could not affect their validity.

According to the view we take of the statute, the judgment in the Baltimore & Ohio Company's case and the judgment in the Lake Erie & Western Company's case must be affirmed; and we think the judgment in the Cleveland, Lorain & Wheeling Company's case must also be affirmed. We have already shown that the demurrer to the petition was

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properly overruled. The only question of fact to which evidence was offered on the trial was whether the fire which destroyed the plaintiff's property was caused by sparks from an engine of the defendant. The evidence was circumstantial, and an effort was made by the defendant to show that the fire might have been caused by sparks from an engine on the Lake Erie & Western road, which ran nearer to the plaintiff's property than did the defendant's road. No evidence was offered to show the defendant exercised due care, and the only instruction requested on the subject of negligence was "that, unless the jury find the injury complained of resulted from the carelessness and negligence of the defendant in running and operating its road, then the verdict should be for the defendant." It was not error to refuse that instruction, because, if the jury should find the fire was caused as alleged in the petition, the plaintiff would be entitled to recover, unless they should find the defendant was free from negligence; for, as has been noticed, it being established that the fire was caused by sparks from the defendant's engine, the burden was then upon the defendant to show it was without negligence. No instruction to that effect was requested, nor was that defense made by answer. If the instruction requested means that the plaintiff must show such negligence as the law implied from the fact that the fire was caused by sparks from the defendant's engine, it was given in the general charge; for the court was quite emphatic in its instructions that the plaintiff could not recover unless that fact was established by a preponderance of the evidence. The refusal of the instruction, therefore, worked no prejudice to the defendant, unless it means more, and required of the plaintiff proof of negligence beyond and in addition to that stated. In that sense it no doubt would have been understood by the jury, and in that sense it is clearly erroneous. Judgments accordingly.

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WATSON *et ux.*

v.

LOUISVILLE & N. R. Co.

(*Supreme Court of Tennessee, Jan. 20, 1900.*)

Excursion Tickets—Validity of Printed Conditions.*—A person purchasing a railroad ticket, with knowledge that it is an excursion ticket sold for less than the usual fare, having upon it a printed notice that it must be stamped by the carrier's agent at the other end of the route, in order to be good for a return passage, is bound by such condition, although he cannot read, and his attention is not called to the condition by the agent selling the ticket; as such a condition is reasonable, and such a purchaser has implied notice, from the fact that it is an excursion ticket, that the ticket contains unusual conditions.

Same—Same—Customs.—The mere fact that such tickets have been received by the carrier unstamped, on other occasions or from other passengers does not establish a custom, nor affect the rule requiring that they be stamped.

APPEAL by plaintiffs from Williamson county circuit court.
Affirmed.

Hearn, McCorkle & Lane, for appellants.

Henderson & Berry, for appellee.

WILKES, J. This is an action for damages for ejecting the wife of plaintiff Aaron from one of the passenger trains of the defendant company. There was a trial before the court and jury, and verdict and judgment for the road, and plaintiffs have appealed and assigned errors. The facts, so far as necessary to be stated, are that the plaintiffs had bought what are termed in this record "excursion" or "Centennial" tickets from Franklin, Tenn., to Nashville, Tenn., and return. These tickets were sold at a reduced rate of one-

*See *Dangerfield v. Atchison, T. & S. F. Ry. Co.* (Kan.), 17 Am. & Eng. R. Cas., N. S., 650, and *note*, p. 654 *et seq.*

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half fare, and were intended for both direct and return passage. The tickets had several coupons attached,—one being for passage to Nashville; another for transportation to the Centennial Grounds from the Union Depot at that city; another for admission to the Centennial Grounds. Immediately following the latter, and in bolder print than the ticket generally had upon it, was the following notice: "To Purchaser: Return part of this ticket must be stamped by the joint agent at Nashville, Tenn., on day of departure, to make it valid for passage." Following this notice was a coupon for passage from the Centennial Grounds to the Union Depot, and another for return from Nashville to Franklin. Upon the body of the return ticket were the words, plainly printed, "Not good for return passage unless stamped by joint agent at Nashville, Tenn." Upon the back was indicated the place at which the joint agent should stamp the date of return, and directions were given to the joint agent as to how the ticket should be stamped and punched for the return. The tickets were not signed, nor were they required to be, and it was not required that the holder should be identified, further than that the ticket should be stamped as indicated. The purchasers of these tickets were negroes, who could neither read nor write, and the provisions and stipulations of the tickets were not explained to them by the agent who sold them the tickets. The purchasers rode on these tickets to Nashville, and visited the Centennial Grounds and other places, and, when ready to return, entered the cars at the South Nashville Depot, and not at the Union Depot, where the joint agent could be found. These tickets were not stamped, had not been presented for that purpose to the joint agent at Nashville, and were not inspected by any employee of the road when the parties entered the train to return home. A crowd of passengers boarded the cars at the same time, and there is evidence that a brakeman or assistant conductor announced, in a loud tone to the crowd as they entered the train, that tickets would not be good for return unless they were stamped, and plaintiff Aaron replied,

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"Mine are all right," referring to tickets held by himself and wife. The plaintiffs were carried some $1\frac{1}{2}$ miles, and, when it was ascertained that their tickets were not stamped, they were put off the train by the conductor's assistant, upon their refusal to pay fare. Not having any money to pay it with them, they were compelled to walk back to Nashville, and, after having their tickets stamped, they went to Frank-
lin by a later night train.

While quite a number of errors are assigned, both as to the admission of testimony, and the charge of the court, and the refusal to give special requests, we think there is nothing material in them, except as hereinafter indicated; and the case turns upon the question whether the requirement that the ticket be stamped in order to validate it was reasonable, and, if so, was a compliance with that requirement indispensable to the use of the ticket, and should the rule be enforced as against these parties who were unable to read or write, and were given no special information or instruction as to the conditions printed on the tickets when they were purchased? The court, in effect, charged the jury that the railroad company had the right to make and enforce a reasonable rule in reference to the sale and use of its special-rate tickets, and its application to the traveling public, and that it was for the court to determine whether a rule was reasonable or not, and that a rule requiring a return ticket to be stamped, validated, or the identity of the purchaser established, when such sale was based upon a reduction of fare, and the ticket sold for a special purpose or occasion, would be a reasonable rule, and no other notice of the requirement or rule need be given than the matter printed or written upon the ticket to that effect; that the fact that the ticket was sold at reduced rates, and for a special purpose and occasion, would be sufficient challenge to the passenger to require him to ascertain the conditions, without having his or her attention called specially to them by the agent, and the fact that the purchaser could not read or write would not change the rule; and that the requirement for stamping in this case was rea-

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sonable, and if not complied with, and the ticket was not stamped, nor any effort made to have it stamped, then the plaintiffs would not have the right to ride upon it, and the railroad employees would have the right to eject them unless they should pay fare, and the company would not be answerable for damages unless the act of putting them off was accompanied by rudeness, violence, unnecessary force, and acts of indignity not warranted by the facts. This change presents the real matter of controversy in the case upon the merits. While the exact question here presented was not involved in the case of *Railroad Co. v. Turner*, 100 Tenn. 214, 47 S. W. 223, 43 L. R. A. 140, it was to some extent considered. It was held in that case that a sale of a railroad ticket at the usual full fare, and not for a special occasion, entitled the purchaser to a full and unlimited right of passage, and that a mere printing of conditions upon the face or back of such ticket, attempting to limit this right, would not have that effect, and would not carry notice to the purchaser of the condition and requirement, unless his attention was called to it, or it was known to him and assented to by him. This holding was based upon the theory that when a passenger purchases a ticket for transportation from one point to another over the road of a public carrier, and pays full or regular ordinary fare, the ticket is not intended as a contract in itself, but as a mere token, or the evidence of a contract which the law creates, and which lies behind the ticket. In such case the law makes the contract, and regulates the reciprocal rights and duties of both carriers and passengers, and the ticket is a mere token that such contract exists, and that under it the passenger is entitled to be carried to and from the points named, without regard to a time limit printed upon it. The ticket itself, however, is not presumed to set out the terms of the contract, and the passenger is not required or expected to look to it for any stipulations or conditions different from what the law imposes. This rule we consider to be beneficial alike to carrier and passenger, and well supported by the great weight of authority in this and other states. *Railroad Co. v. Turner*,

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100 Tenn. 214, 47 S. W. 223, 43 L. R. A. 140, and authorities there cited. In such cases of ordinary tickets, the ticket is not the evidence of the terms of the contract of passage, and not conclusive of the right to passage, but only a token that the ordinary contract implied by law has been entered into. *O'Rourke v. Railway Co.*, 103 Tenn. —, 52 S. W. 875. It was further said *arguendo* in the *Turner Case* that tickets might be sold at reduced rates upon special occasions, and reasonable conditions and limitations might be annexed to their use when known to the purchaser, and assented to by him orally or in writing, and, when so sold at reduced rates for special occasions, this was sufficient to put the purchaser upon inquiry, and affect him with notice that some special terms and conditions should be expected and looked for, and the fact of buying such ticket when the passenger had the option to buy the regular ticket at usual rates was sufficient to put him on guard, and affect him with notice of unusual terms attached to its use, and this, we think, is a correct rule. Elliott, R. R. § 1593, and note, citing cases. It is not indispensable that the ticket contract should be signed by the purchaser if he had notice of the terms, or was put upon inquiry, and assented to the requirement or conditions. Ray, Neg. Imp. Duties, § 144. We are of opinion the rule requiring the return ticket to be stamped in order to be valid is reasonable, and should have been complied with. *Mosher v. Railway Co.*, 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249; *Boylan v. Railroad Co.*, 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290; *Edwards v. Railway Co.*, 81 Mich. 364, 45 N. W. 827; Ray, Neg. Imp. Duties, § 144.

The reason for requiring the tickets to be stamped at Nashville was stated to be that passengers might not be able to buy them at reduced rates upon the assumption that they were going to Nashville, and then use them to intermediate stations, where the usual and regular fare would be greater than the special rate or fare to Nashville, and the object and purpose of the special rate was to induce persons to attend the exposition at Nashville in large numbers, which

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would compensate the road for the reduction in fares, and this, we think, is a valid and sufficient reason for the rule. It is said with much force, and insisted upon with great earnestness, that, even if such a rule be reasonable and enforceable in ordinary cases, still it cannot be enforced as to persons who can neither read nor write, and who are not specially notified of the requirements and conditions upon which the tickets are sold and to be used, and it is stated that a large proportion of the population of the country cannot read or write, and especially is that true as to negroes; that it is a matter of common knowledge that negroes are ignorant, and unable to read or write, as a general rule, and these passengers belonged to that race and class, and this fact, being apparent, imposed on the agent a duty of giving them proper information and explanation. It will be seen at a glance that this contention presents a serious question, and one which must largely affect railroad travel in those districts of our country where the negro population is found and other uneducated people reside. If the public carriers of the country are required to inform themselves whether passengers or shippers can read or write, and, if they cannot, then all conditions and requirements and rules are to be explained orally to them, it would impose a task upon such carriers that might become very burdensome to carriers and annoying to passengers, and interfere materially with the dispatch of business, both as to passengers and freights; and the rule must perhaps be logically extended further, so as to throw upon the railroads the duty of discriminating between the intelligent, who can easily comprehend the conditions and requirements, and others not so well informed, and not so apt to grasp all the details of the contract into which they are entering; and likewise passengers who do not understand our language would be debarred from accepting any special rates, as the terms and conditions could not be explained to them, either in writing or orally, unless the railroad employees should be versed in the use and knowledge of different tongues, or the tickets should be printed in

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different languages. We are cited to two cases bearing upon this feature of the controversy; the first being the case of *Mauritz v. Railroad Co.* (C. C.), 23 Fed. 765, and the second the case of *Railroad Co. v. Baldauf*, 16 Pa. St. 67. The first of these cases involved the effect of a notice limiting the liability of road for baggage, which was printed on the face of the ticket. The purchasers of the tickets were foreigners, and could not speak, read, or understand the English language, and no explanation or information that a value limit was placed on their baggage was given them by any employee of the road. The tickets were third class, and sold at reduced rates, and contained other conditions besides the limitation of value upon the baggage. None of the special conditions and limitations were known as a matter of fact by the purchasers. It was, in substance, held that because of this inability to read or understand the writing upon the tickets the purchasers were not affected with notice of the provisions contained therein, and were not bound by the special terms and conditions printed on the ticket, in the absence of any explanation of the same. It was also said that limitations as to liability for baggage could not be expected upon the ticket for passage fare, and hence would not be noticed. The latter case of *Railroad Co. v. Baldauf*, reported in 16 Pa. St. 67, is also a case in which there was an attempt to limit the liability of the carrier for baggage by general published notice and printed matter upon the ticket. It was held that such limitation of liability could be enforced if there was a special contract to that effect, but that the terms must be plain, and fully known to the purchaser. In this case the purchasers were Germans, and could not read or understand the English language. The court held, in general terms, that the carrier might limit its liability if it could show clearly that the party with whom it was dealing fully informed of the terms and effect of the notice, and that the exemption rested upon the ground of a contract, express or implied, between the parties. The court said, in substance, it would be absurd to hold the company not liable

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on the ground that a special contract existed when the purchaser was undoubtedly ignorant of its terms; that, if the ticket is made the evidence of contract, it must be in a language the purchaser could understand, or the terms of the contract must be explained to the purchaser. It will be observed that both of these cases involve a limitation of liability of the carrier, while the case at bar simply involves a question of the reasonableness and enforcement of a rule relating to the general conduct of the road's business, and the effect of a noncompliance therewith, and does not in any way relate to a limitation of liability, nor a provision concerning the same.

The theory upon which unusual terms in excursion tickets are upheld is that: (1) They are sold at reduced rates of fare, and not at the usual or ordinary rates. (2) They are sold for special occasions, and not for ordinary and unlimited use. (3) By accepting such ticket when he has the option to purchase the usual and ordinary ticket, the passenger enters into a contract with the carrier different from that implied by law upon the purchaser of an ordinary ticket at full rates of fare. (4) The purchaser is bound in such cases by the terms of the contract. He is entitled to its advantages of reduced fare, and is bound by reasonable regulations for its use.

But the question recurs, is such contract binding upon a party who cannot read or write, and who is not specially notified of its terms when he purchases, and can he in such cases be held to have assented to the terms and entered into the contract? We are of opinion that it is equally important to hold carriers responsible according to the terms imposed by law in the sale of ordinary tickets at the usual rates, when the terms of the contract are dependent entirely upon the law, and not upon contract, as it is to permit them, for reduced rates or other valuable considerations, to make reasonable special contracts for carriage of passengers or property as may be agreed on with the passenger or shipper, and it is as much the duty of the court to enforce the contract made

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by the parties in the latter case as it is to enforce the contract made by the law in the former case. It is equally for the benefit of the carrier and the public that the right to make these special contracts, when reasonable, should be upheld and enforced. Large numbers of passengers take advantage of excursion rates who would otherwise not be able or willing to travel at all. People of limited means most generally avail themselves of these reduced fares, and do so with the full expectation that they will be subjected to requirements and inconveniences that they would not meet on ordinary occasions when paying full fare. On the other hand carriers reap a benefit from them in increased travel, with increased receipts, though not the usual profits. It is not consistent with public policy to so restrict and hamper the use of such tickets as to prevent the running of excursions and the granting of such rates. To do so would be to deprive persons of limited means of the opportunities for travel which they desire. It would fall most heavily upon the class to which the plaintiff belongs,—a class which it is matter of common knowledge generally avail themselves of such opportunities.

Under the record in this cause, there can be no doubt that the plaintiffs knew they were purchasing excursion tickets for a special occasion, and at greatly reduced rates. The plaintiff Aaron, before he entered the cars at Franklin, remarked to a fellow passenger who had bought a regular ticket that he ought to have bought one like his, as it was cheaper. It is evident that it was a matter of common information, and known to these parties in a general way, that their tickets were not the ordinary tickets, good for one passage in one direction, but that they were round-trip tickets, and had annexed to them some conditions and requirements not pertaining to ordinary tickets, though they did not and could not get that information from the tickets alone, because they were unable to read or write. They made no attempt to learn their terms and requirements. It is not shown that the road misled or deceived them, or withheld any informa-

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tion asked for by them. It appears from the record that at and about this time large crowds were daily thronging the cars, of just such people as the plaintiff Aaron and his wife, nearly all using excursion tickets, bound for the same destination, and crowding the cars to their full capacity. It is apparent how impracticable it would be, and what a serious obstacle it would prove to travel, to require that the terms and conditions of each ticket should be fully explained to each purchaser, nor could it be required that all the intending passengers should be collected together, and orally instructed at one time; and, if it should be held that agents must instruct illiterate persons when they present themselves to purchase tickets, the burden would still remain upon the carrier, whenever a controversy arose, to prove that the agent did give such instruction to each particular purchaser, and when there are scores and hundreds of excursionists this would prove unreasonably burdensome, and practically impossible. From the evidence of Kidd, the conductor, and the other employees upon this train, it appears that colored excursionists during the Centennial and on this occasion thronged the trains until, in the language of the witness, they looked like clouds of blackbirds, and it was impossible to enforce any rules or preserve any order among them when they were attempting to enter the cars. He describes them as pushing, crowding, rushing, and running over each other, until it was impossible to restrain them sufficiently to require them to present their tickets for inspection before entering the cars. Upon such occasions, the rules and precautions taken by the carrier to insure the safety and proper reception of passengers became unusually irritating and annoying to them, and difficult of enforcement. We think the most reasonable and the safest rule in cases like the present is that foreshadowed and outlined in the case of Railroad Co. v. Turner, that when the purchaser buys a ticket at less than the usual fare he is put upon notice that he may expect unusual conditions and special rules, and if he have the misfortune

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to be unable to read or write the burden is upon him either to make that fact known to the agent, or to ascertain from some one who can read what are the terms and conditions of his ticket, and when it appears, as it does from the proof in this case, that he has actual notice of some terms and conditions, it does not matter that he cannot read or write, or learn of such terms from the face of his ticket. we are convinced from the record that these complainants, as a fact, knew that their tickets must be stamped in order to be valid for return passage, even though they could not read nor write, and, having accepted and used the tickets, they were bound to comply with the rule, and, in the absence of such compliance, were not entitled to passage on such tickets, and their ejection was not unlawful or actionable.

Upon a motion for a new trial, it was shown that several persons did use return tickets which were not stamped, and this, it is argued, shows an unjust discrimination against the plaintiffs, and an abandonment of the rule, and upon this newly-discovered testimony a new trial should have been granted. It does not appear that there was any intentions to discriminate between passengers, and such fact is not stated in the affidavits. These might have been, so far as we can know, reasons for not enforcing the rule upon certain days, and putting it in force on others. The rush and crowd may have prevented the conductor from enforcing the rule rigidly, and some persons may have been overlooked. But the fact that other passengers, and even these plaintiffs, had been allowed to travel without having their tickets stamped on other occasions would not abrogate the rule, unless it was so common or frequent as to amount to a custom or an abandonment of the rule, and to mislead the passenger. It is not shown that these parties knew of such instances. On the contrary, it affirmatively appears they did not. The mere fact that unstamped tickets had been received on other occasions or from other passengers does not establish the custom nor affect the rule. *Hill v. Railroad Co.*, 63 N. Y.

Same—Same—
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101; Stone v Railroad Co., 47 Iowa 82; Wakefield v. Railroad Co., 117 Mass. 544; Deitrich v. Railroad Co., 71 Pa. St. 432. For the reasons indicated, we are of opinion there is no error in the verdict and judgment of the court below, and it is affirmed, with costs.

MITCHELL

v.

SOUTHERN RY. CO.

(*Supreme Court of Mississippi, May 7, 1900.*)

Round-Trip Tickets—Validity of Conditions.*—Stipulations in a ticket, that it shall be good for one month only, and that the purchaser shall have himself identified as such at the terminal point of his journey, and that the ticket shall be good 3 days only after identification, is binding on the party who thus contracts with the railroad; and the purchaser cannot travel on such ticket after the expiration of the month although the commencement of his return journey and such identification was on the last day of the month; unless he is delayed on his return trip by something attributable to the carrier or a connecting line, or an accident to one of such carriers.

Legal Conclusions.—Allegations that an ejection from a train was made with indignity, brusqueness, wrong, harshness, injustice, etc., are but statements of legal conclusions.

Void Ticket—Passenger's Statements to Conductor—Ejection.†—A stipulation on such a ticket showed that it expired on October 4th. The complaint alleged that plaintiff presented it to the conductor, after such date, and told the latter that he had applied to the agent on October 2d for identification, and was told by the agent he had better not then identify, as some of the connecting lines could not operate because of yellow fever, and that he could get extension of time, and that the agent then refused identification, and that on October 4th he applied for extension, and was refused, and that he then obtained identification, and started on the return trip; and that,

*See notes, 17 Am. & Eng. R. Cas., N. S., 654 *et seq.*

†See note, 11 Am. & Eng. R. Cas., N. S., 216 *et seq.*

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notwithstanding this statement, the conductor put him off the train. *Held*, that these allegations stated no cause of action on the ejection; as a conductor need not accept such oral statements of a passenger, when merely supported by the production of a ticket void on its face.

APPEAL by plaintiff from Warren county circuit court. *Affirmed*.

Leroy Percy, for appellant.

Dabney & McCabe, for appellee.

CALHOON, J. The declaration in this case is for damages against the railway company, and has two counts, and it was demurred to, and the demurrer was sustained, and Mr. Mitchell appeals. Case Stated.

In his first count he charges that, on September 4, 1897, he bought in Vicksburg, Miss., a ticket for passage to and return from Washington City. He bought it from the Alabama & Vicksburg Railway Company, which was acting in the sale for itself and as agent for the appellee and divers other connecting lines between Vicksburg and Washington City. This ticket provided that, before commencing his return from Washington City, Mr. Mitchell should be identified there before the authorized agent of the Baltimore & Ohio Railroad, who should stamp and date the identification. Then follows the fourth clause of the contract part of the ticket, which is in these words: "The punch mark in the margin of the face under the head of 'Return Transit Limit' indicates the number of days which will be allowed to said purchaser from the date of said identification in which to return to the point at which this ticket is sold. This ticket shall not be good for return passage after midnight of the last day so allowed, and in no event later than the date canceled in the margin of the face hereof under the head of 'Return Passage.'" The date so canceled is October 4, 1897, and the number of days allowed to complete the return journey to Vicksburg after identification is indicated by the punch mark to be three. The first count then states the case to be that Mr. Mitchell was identified by the proper agent in

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Washington on October 4, 1897, and on that day he commenced his return transit towards Vicksburg, and his case is based on the claim that he had three days in which to return to Vicksburg from the date of identification, although he procured the identification on a day which made it impossible for him to complete his return journey to Vicksburg by midnight of October 4th. This count then proceeds to aver that on the next day, October 5, 1897, being at Johnston City, on his way back, he was wrongfully rejected" from its car by appellee's conductor, "in the presence of many passengers, with great indignity and wrong and hardship," etc. It will be seen that the gravamen of this count is the predicate that the plaintiff was entitled to travel on his ticket after midnight of October 4, 1897, because he commenced to travel on it on that day, it being the day he was identified in Washington. We cannot approve this view. It was not the contract he made at Vicksburg. By that contract he had three days from the purchase for his trip to Washington, and no more, and three days for his return to Vicksburg from the date of identification, and no more. By that contract his ticket was dead at midnight of October 4th, regardless of the date of identification. By it, whensoever he procured his identification, although he may have had even 10 or 20 days to spare of the 30 between September 4th, day of purchase, and midnight of October 4th the day of expiration, he could not stop to prevent it, but must make his return trip within the three-days limit. After midnight of October 4th he had no right, by virtue of that ticket, on any train of any of the connecting lines, and might be properly ejected from any by the conductor. All the sound reasoning and the great mass of authority favor this view. The cases are cited in the very exhaustive and able briefs of the counsel on either side. In fact, those two or three cited by the learned counsel for appellant, when carefully scrutinized, are not in conflict with our conclusion. In *Lundy v. Railroad Co.*, 66 Cal. 191, 4 Pac. 1193, the ticket read, "Not to be good for passage" after nine days from sale, and we are not prepared to say the court was wrong in holding plaintiff entitled if he took passage be-

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fore the nine days expired. We make the same observations as to *Auerbach v. Railroad Co.*, 89 N. Y. 281, in which case the ticket recited that it was "good for one continuous passage," but not to be "used" before September 26th, and the court properly, perhaps, held the holder entitled if he began its use before September 26th. We make the same observation as to *Railroad Co. v. Bigelow*, 68 Ga. 223, where the ticket read, "Rome and return, if used within two days from the date sold." In all these cases it may well be said that the company's reservation must be taken most strongly against it, and it should have clearly fixed the precise limitation of use or passage. In the case at bar it is precisely fixed, and we cannot make contracts for the parties. There can be no question of the meaning of this ticket. Its very terms prescribe that "in no event" shall it be good after midnight of October 4th. All that has been said is, of course, subject to the modification that, if the purchaser started in time to make his passage within the three days, he should not suffer if any casualty or incapacity of any of the connecting lines made the journey impracticable within the limit. As to so much of the first count as charges that the ejection was made with indignity, etc., and as to so much of the second count as charges brusqueness, wrong, harshness, injustice, etc., we suppose they are not really depended on. If they are, the dependence falls, because they charge conclusions only, and do not give facts from which the conclusions are drawn of which the court may judge. The demurrer was properly sustained as to the first count.

Legal Con-
clusions.

The second count adds to the first the averments that, two days before the expiration of the limit, and in time to reach Vicksburg within the period, plaintiff applied for identification to the proper agent, who "recommended and advised" him not to be then identified, because he could not get home on the route within the three days, since, on account of yellow fever, some of the connecting lines could not operate, and "refused

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and declined" to stamp his identification, and said that his limit would be extended "upon application," such extension being then a universal practice on that system. This was on Saturday, October 2d. On October 4th he applied for extension, and was "brusquely, wrongfully, harshly, and unjustly refused." Still he then had himself identified, and started, and was ejected as set forth in the first count, although he communicated the facts to the conductor; and the count concludes that the conductor "so ejected this plaintiff, doing him the great wrong and injustice aforesaid, to his damage," etc. By all rules of construction of pleading this count is based on the ejection from the train, and not on any refusal to identify. This seems to be brought in merely in recital of the history of the case. At any rate, the plaintiff claims no damage because of it. An action based on that, and sustained by proof, would entitle him to damages to cover what he may have had to expend to get home by another route with timely departure, and to other damages if the refusal was accompanied by insult appropriately pleaded. We consider now, therefore, the ejection, presuming, as we must, that plaintiff was properly and politely ejected. The case, in this aspect, in effect is this: Plaintiff produced his ticket, which showed itself to be void, and told the conductor that he had applied to the agent on October 2d for identification, and was told by the agent he had better not then identify, as some of the connecting lines could not operate because of yellow fever, and that he could readily get an extension of time, and that the agent then refused identification, and that on October 4th he applied for extension, and was refused, and that then he obtained identification, and started home; and that, notwithstanding this statement, the conductor put him off the train. This states no cause of action on the ejection. Plaintiff relied on extension of time at his own peril. He knew there was nothing in his contract binding the carrier to extend, and that any extension would be a mere gratuity. He should have insisted on identification, and could have sued if refused. On the question of his

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right to sue for the ejection, we are clearly of the opinion that it does not exist. To hold that it does, involves the logical conclusion that a conductor must accept any oral statement of a passenger, even merely that he had lost his ticket; thus putting railroad companies at the mercy of every tramp, and thus putting conductors to the alternative of accepting as true all statements or subjecting their companies to an action for damages. The Riley Case, 68 Miss. 765, 9 South. 443, and the Holmes Case, 75 Miss. 371, 23 South. 187, have carried the doctrine as far as it can be pressed without crossing the danger line of injustice to railroad corporations. We approve both of those cases, because in each of them the passenger had, and exhibited to the conductor, evidences showing reasonably the statement to be true. Here there is nothing to support the oral statement but the mere production of a ticket absolutely void on its own face. The demurrer was properly sustained to the second count. Affirmed.

SHAW

v.

CHICAGO & G. T. RY. CO.

(Supreme Court of Michigan, April 24, 1900.)

Injury to Passenger—Throwing Mail Pouch from Train—Knowledge of Railroad—Pleading.—In an action for injury to a passenger in defendant's depot by reason of the throwing of a mail pouch from a train, in the absence of a demurrer, the allegation that defendant, by its servants made a practice of permitting or allowing the mail pouch to be ejected from the trains in a manner and at a place which subjected persons lawfully upon the depot premises to hazard sufficiently implies knowledge of such practice on the part of the railroad.

Same—Same—Evidence.—In such action, evidence tending to show that such an accident was liable to happen was competent, although it did not show that the mail pouch had previously struck at the precise point where plaintiff was when injured.

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Same—Same—Liability of Railroad.*—A railroad company is not primarily liable for the negligence of a mail agent on its train, but it owes the duty of not permitting dangerous habits of the agent in delivering heavy packages from the train in such manner as to endanger persons lawfully on its premises to continue.

Same—Same—Evidence of Similar Accident.†—In such action, it was proper to allow plaintiff's witness to be asked whether he was present at one time when a similar accident occurred at such depot; and defendant could not complain that an affirmative answer to the question was allowed to go to the jury, although it was developed by cross-examination that the accident was remote from the time of plaintiff's injury; as there was no request to have the question limited as to time, and no motion to strike out.

Witnesses—Evidence of Bias—Harmless Error.—In such action, plaintiff called as a witness the mail agent who threw the mail pouch causing the injury, and, in connection with his testimony, offered in evidence a written notice given by the attorney of the company notifying him of the suit, and stating, "you are notified that your act caused said injury, and your negligence, if any, occasioned said actions," and stating that he would be held responsible for any damages recovered, and tendering him control of the suit. *Held*, that defendant was not prejudiced by the introduction of such paper.

Remarks of Counsel.—Although plaintiff's counsel, in his argument to the jury, made an improper use of such paper, claiming it to be evidence of an admission of liability by defendant, such conduct did not warrant a disturbance of the verdict; as the court took pains to remove any false impression on the subject from the minds of the jury.

Case at Bar.—The verdict was not so clearly against the evidence as to justify a refusal.

Excessive Verdict—Loss of Eye.—\$7,000 is not an excessive verdict for a very painful injury causing the permanent disfigurement and loss of sight of an eye.

ERROR by defendant to Eaton county circuit court.
Affirmed.

E. W. Meddaugh (Geer & Williams and L. C. Stanley, of counsel), for appellant.

Dean & Hooker, for appellee.

*See note, 6 Am. & Eng. R. Cas., N. S., 487.

†See note, 14 Am. & Eng. R. Cas., N. S., 321; *Hutcherson v. L. & N. R. Co.* (Ky.), 15 *Id.* 846.

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MONTGOMERY, C. J. Plaintiff went to defendant's station at Millett at about the hour of 7:30 a. m. on the morning of July 4, 1898, to take a local train for Lansing, due at Millett at 8:17 a. m. Defendant's train No. 1, west-bound, was due at Millett at 7:35 a. m. This train carried mail, but was not scheduled to stop at Millett. Mail had been carried on this fast train since some time in 1893, during which time the mail sack had been thrown off and picked up at this station while the train was in motion. The plaintiff was in the station, sitting near the window at the northeast end of the building. The bottom of the window was 3 feet above the floor, and the window was near the center of the east wall of the building, which was 16 feet in width and 32 feet in length. The platform in front of the building was 12 feet in width, and the rail nearest the platform would be about 3 feet distant from the platform. The evidence shows that the mail bag was either kicked or thrown from the car door, and went about 18 feet to the east and 30 feet to the southeast. In other words, it was thrown from the car when the train was 30 feet distant from the station, and was thrown 18 feet away from the car. The mail pouch did not strike the ground, but went through the air sufficiently high to go through the window 3 feet above the ground, breaking the sash and panes out. The glass from the broken window struck the plaintiff in the eye, which has resulted in total loss of sight in that eye, and caused a disfigurement of the eye. In an action against the railroad company plaintiff recovered a verdict of \$7,000, and defendant brings error.

It is insisted that the declaration states no cause of action, and that error was committed in admitting any evidence under the declaration. The declaration contains the following averments: "That while the said plaintiff was lawfully upon the premises of said defendant upon said day and year aforesaid, and while seated within said depot of said defendant, next to the window at the northeast end of said depot, upon a seat placed in said depot for the convenience and use

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of prospective passengers of said railroad company aforesaid, a certain fast west-bound train, commonly known as a 'mail train,' and scheduled to arrive at the station of Millett aforesaid at 7:35 o'clock, or thereabout, in the morning of the day and year aforesaid, and each day of the week during which time it was so scheduled to arrive, passed through said station of Millett aforesaid at a high rate of speed, which said train was scheduled by said railroad company not to stop at said station of Millett aforesaid, but to pass through said place or settlement without stopping, and which said train carried mails of the government of the United States of America, and from which train it was the practice of the agent or mailing clerk on said west-bound train to eject a mail pouch or bag at said station of Millett, from the mail car attached to and a part of said train, while said train was in motion and running at a high rate of speed; and said mailing clerk or agent, on the said 4th day of July, 1898, aforesaid, ejected said mail pouch or bag aforesaid from the door of said mail car aforesaid at said station of Millett aforesaid in manner aforesaid. That it was the custom and practice of said defendant, through its servants, to allow said mail pouch or bag aforesaid to be ejected from its said fast west-bound mail train so scheduled to arrive at and pass through said station of Millett as aforesaid, without stopping, while running at a high rate of speed. And thereupon, to wit, the 4th day of July, 1898, and upon all such days upon which said west-bound mail train was scheduled to arrive at and pass through said station of Millett aforesaid without stopping, and at the said station of Millett aforesaid, it became and was the duty of said defendant to manage and conduct its said west-bound mail train aforesaid, by its said servants or servant, with all due care, caution, and diligence, and in a manner which would afford safety to those persons or that person who might be lawfully upon the premises of said defendant aforesaid. Yet the said defendant did not regard its duty, and use due care, caution, and diligence, but, on the contrary thereof,

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by its said servants or servant, made a practice and custom of allowing and permitting said mail pouch or bag aforesaid to be ejected from said west-bound mail train in a manner and at a place which subjected the persons or person who might chance to be lawfully upon the premises of said defendant at the time and place aforesaid, or upon any day upon which said west-bound mail train aforesaid was scheduled to so arrive, to hazard and danger or injury; and upon the said 4th day of July, 1898, while the said plaintiff was so seated in said depot of said defendant as aforesaid, at said station of Millett, the plaintiff being then and there lawfully, and in and about her proper business, and in the exercise of due care, caution, and diligence, and without negligence or fault on her part, the said defendant, through its negligence and the negligence of its said servants or servant, allowed and permitted said mail pouch or bag to be so ejected from said west-bound mail train aforesaid, while in motion and while running at a high rate of speed and at such a place on said premises, that it struck the said window upon the northeast end of said depot aforesaid, and, breaking through said window aforesaid, caused said plaintiff to be struck in the left eye by said mail pouch or bag aforesaid." It is said that the declaration fails to state defendant's duty; that it states inferences, and not facts; that there is no averment that the defendant knew of the dangerous practice of discharging the mail bag. It is alleged, however, that the defendant, by its servants, made a practice of permitting and allowing the mail pouch to be ejected in a manner and at a place which subjected the person or persons who might chance to be lawfully upon the premises to hazard. This averment implies knowledge, and, if not deemed sufficiently specific, should have been demurred to. See *Fox v. Iron Co.*, 89 Mich. 387, 50 N. W. 872.

Injury to Passenger—Throwing Mail Pouch from Train—Knowledge of Railroad—Pleading.

The plaintiff offered testimony tending to show that for a

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bare introduction could have damaged defendant. The paper contained no admissions of liability on the part of the company.

In the argument plaintiff's counsel referred to this notice as follows: "Why did they serve notice on him to come in and help defend the suit? They knew a judgment stared them in the face. They knew their negligent acts made them liable and responsible for it."

Remarks of
Counsel.

This was excepted to. The circuit judge began his charge as follows: "Before I give you the law in the case, I think I had better suggest to you something briefly regarding one suggestion made by Mr. Dean in his argument, and that is about the notice served upon Mr. Fulton. I thought possibly, in his zeal, he might have said something that you might misconstrue. As a matter of fact, he did not say anything really out of place. That notice the railroad company had a perfect right to serve. It was a fair and proper thing for it to do. It was not served on the government. It was served on Mr. Fulton, an employee of the government, to protect its legal rights. Should a judgment be rendered against it, if it desired or felt that Mr. Fulton was the man that should pay any damages, should any be rendered, it had a perfect right to serve that paper. I want to call your attention more particularly that the fact of serving that paper is not an admission that it is liable, and you ought not to find it so from the fact of serving that paper." While it is manifest that counsel made an improper use of this paper as evidence of an admission by defendant, it is equally manifest that the court took pains to remove any false impression from the minds of the jury. We do not think the judgment should be disturbed on this ground, as we feel satisfied that the jury could not have failed to understand the caution of the court.

Other exceptions were noted to the argument of counsel. We do not find in it any such abuse of privilege or distortion of the evidence as called for the interposition of the court.

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Error is assigned on the refusal of the court to grant a new trial. We do not find the verdict so clearly Case at Bar. against the evidence as to justify us in reversing it on that ground. We also think that there was evidence to support the theory given to the jury by the charge.

As to the claim that the verdict was excessive, it is true that \$7,000 is a large sum. The injury is, however, severe. Besides being very painful, Excessive Verdict—Loss of Eye. it caused permanent disfigurement to the eye and loss of sight. We do not think the award of damages so grossly excessive as to justify us in interfering. The judgment will be affirmed, with costs.

HOOVER, J., did not sit. The other justices concurred.

RISTINE

v.

BLOCKER.

(Court of Appeals of Colorado, June 11, 1900.)

Liability of Master for Malicious or Wanton Acts of Employee—Punitive Damages—Statute.—The statute of Colorado providing "that in all civil actions in which damages shall be assessed by a jury for a wrong done to the person, or to personal or real property, and the injury complained of shall have been attended by circumstances of fraud, malice or insult, or in wanton and reckless disregard of the injured party's rights and feelings, such jury may, in addition to the actual damages sustained by such party, award him reasonable exemplary damages," does not extend to actions against a railroad for an act of its employee, unless such act was expressly authorized by the employer, or is afterwards confirmed by it; as the wrongful act, according to the proper construction of the statute, must be the act of the party sued.

Same—Same.*—In the absence of a statutory provision, a railroad

*See *Haver v. Central R. Co. (N. J.)*, 17 Am. & Eng. Corp. Cas., N. S., 490 and *notes*, 493.

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corporation cannot be charged with punitive or exemplary damages for the illegal, wanton, and oppressive conduct of a conductor of one of its trains towards a passenger, unless such conduct was expressly authorized, or is afterwards confirmed.

Ejection of Passenger—Malice and Wantonness—Sufficiency of Evidence.—It appeared that plaintiff was insisting on his rights to ride on his membership in the Brotherhood of Railway Trainmen, and was also endeavoring to compel the conductor to hold money as security for his fare until he got to his intended destination; and it did not clearly appear whether plaintiff tendered his fare prior to the time that the conductor stopped the train, or pulled the bell to stop it, for the purpose of ejecting plaintiff; and there was no other evidence showing that he was ejected improperly, or in an improper manner. *Held*, that there was not sufficient evidence of either fraud, malice, or insult, or of a wanton disregard of plaintiff's right in the conduct of the conductor in making the ejection for submission to the jury.

APPEAL by defendant from Arapahoe county district court.
Reversed.

Blocker came to Divide, over the line of a connecting road, and attempted to become a passenger on the Colorado Midland when its train reached that station. He took passage and continued to ride until he was put off the train at a switch shortly out of the station. The circumstances of his ejectment were matters of proof by various witnesses. The whole controversy grew out of Blocker's attempt to ride on the train without the payment of his fare. He was an employee of another railroad corporation running out of Chicago, and had in some way been hurt, and was in Colorado. We shall not attempt to state *pro* and *con* the contention of the plaintiff and of the road, nor balance the one against the other. The statement will be confined to those facts which are necessary to exhibit the controversy, and the general basis to which counsel attempt to apply conflicting rulings upon a much-disputed question. Blocker had no ticket. He tried to induce the conductor to permit him to ride on what is called among railway men a "Traveling Card." It purported to have been issued in 1897 by the Brotherhood of Railway Trainmen, and certified

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that he was a member of the Brotherhood in good standing, and entitled to fraternal courtesies. His occupation was stated as that of a brakeman. The card bore date in 1896. He stated that he did not have his 1897 card with him, but that they were exactly similar, except as to dates. The conductor refused to receive it, or to allow him to ride on it; stating that the rules of the company did not permit the recognition of cards as passes or as permits to ride without the payment of fare. Blocker insists that there was an altercation between him and the conductor about it. When the conductor refused to recognize the card, he insists he produced the money, and wanted the conductor to hold it until he got to the Springs, when he would get a pass, or, if he did not get a pass, the conductor could then take out the fare. This the conductor refused to do. Blocker was noisy and quarrelsome and insistent about it, and the discussion led to quite a controversy. The principal matter about which there is a dispute between Blocker and one or two of his witnesses and the conductor and others is as to Blocker's tender of the money, or his offer to pay fare, providing the conductor would give a receipt for the money, so that he could get the money back when he got to the Springs, or some other point where his right would be recognized. Blocker insists he tendered the money and offered to pay the fare if the conductor would give him a receipt. This is denied. The matter is in hopeless conflict, though it is probably settled adversely to the company's contention by the verdict. This the counsel for the company concedes, and admits the only question properly predicable on the record is one of law. Possibly this is true, though we do not believe the proof warranted the instruction which is complained of. At all events, the conductor assumed that Blocker refused to pay his fare, insisting on his right to ride on the traveling card, and, acting thereon, the conductor went forward and rang the bell to stop the train. When he came back and told Blocker that this was the place where he got off, Blocker wanted to pay his fare, which the conductor refused to

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receive; contending that, under the rules of the company, when he had once stopped the train he could not afterwards receive the fare. Waiving any further discussion of the testimony, save as to a few suggestions which may appear in the opinion, it need only be stated the case was submitted to the jury on instructions which in the main are uncomplained of, save as to one which is made by both counsel, and rightly, as the majority believe, the pivotal question in the case. When the court instructed the jury, first reciting the respective contentions of the parties, and then stating the law controlling the rights of the prospective passenger and the right and the duty of the company, the court charged them, substantially, that exemplary or punitive damages were allowable in this state when the injury complained of was attended by circumstances or fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings. This rule of law was several times repeated, but always in substantially this form, and in practically the language of the statute. The company insists that this was error. The statute by which the appellee defends the instruction was passed in February, 1889, and is found in the Session Laws of that date, at page 64. It not having heretofore been construed, we will consider it. It consists of one section, and is: "That in all civil actions in which damages shall be assessed by a jury for a wrong done to the person, or to personal or real property, and the injury complained of shall have been attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of the injured party's rights and feelings, such jury may, in addition to the actual damages sustained by such party, award him reasonable exemplary damages." The jury rendered a general verdict for the plaintiff for \$500. From the judgment the defendant appealed.

Rogers, Cuthbert & Ellis and George C. Preston, for appellant.

Patterson, Richardson & Hawkins, for a ppellee.

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BISSELL, P. J. (after stating the facts). On this record we are confronted with the inquiry whether a railroad company can be mulcted in exemplary or punitive damages for the acts of a conductor done while he is engaged in the performance of his duties. Prior to the enactment of the statute, it would not have been debatable. Long ago, in elaborate and fully-considered opinions, reviewing the whole subject, the supreme court decided that exemplary damages could not be recovered in civil actions sounding in tort where the injury done admitted of a criminal prosecution. The court went no further in the *Hobbs Case*, 7 Colo. 541, 5 Pac. 119, than to inhibit the recovery of these damages in such actions. The learned court, however, very gravely suggested it was a doubtful proposition whether they could be recovered in the other large class of actions in tort, even though the act would not subject the offender to a criminal prosecution. Subsequently the same court, though then differently constituted, extended the doctrine, and denied the assessment of punitive damages in any civil action sounding in tort, though the proof might show the injury was committed wantonly and maliciously. We may therefore safely conclude it was the opinion of that tribunal that these damages might not be had in any action of this description. Thereby it became the settled law of Colorado, and remained such until the passage of the act. *Murphy v. Hobbs*, 7 Colo. 541, 5 Pac. 119; *Railway Co. v. Yeager*, 11 Colo. 345, 18 Pac. 211.

It will be observed the passage of this act followed the *Yeager* decision within less than a year, and may be taken as probably a professional, and certainly as a legislative, reversal of the rule which these two cases established. Under these circumstances, we must accept the statute as expressive of the will of the people, observe it in all cases to which it is applicable, and apply it whenever the occasion arises and we can see the case as made is brought clearly within the terms of the enactment. The question as presented to us by the appellant assumes the form of a clear-cut discussion of the question whether a corporation can ever be held liable to

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respond to such damages in any action sounding in tort where the injury complained of resulted from the acts of its agent. On the other hand, the appellee has not only met the appellant on his own ground and discussed this broad inquiry, but he has invoked the statute, and insists that it has established another rule, and permits the assessment of punitive damages in such actions. In the view which we take of the statute and its proper construction, we must necessarily support the statement of our convictions respecting it, and its true meaning, and measurably, at least, discuss what counsel have made a pivotal inquiry. To give both counsel due credit, we may observe they have with great zeal and industry collated all the leading authorities which the books present on both sides of this question; not omitting the learned and memorable controversy between Prof. Greenleaf and Mr. Sedgwick, and calling, also, to our attention the learned, yet somewhat vituperative and unjudicial, discussion to be found in some of the later text-books. Recurring to the statute: The appellee naturally lays great stress on the breadth and universality of the language of the act. It begins, "In all civil actions" (Sess. Laws 1889, p. 64); and he argues with great zeal, and not without acumen, that no exception can be found in civil actions sounding in tort, because the terms of the statute *ex vigore* apply to all civil actions, providing the action or actions be brought to recover for injuries done to the person or to personal or real property, and the injuries are attended by the circumstances designated in the statute. Those circumstances, of course, are fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings. Counsel might have gone even further, and on the word "circumstances" constructed a troublesome argument deducible from the use of that peculiar word. They might have ingenuously contended that it was the legislative intention to prescribe a rule which should permit the assessment of such damages wherever fraud could be alleged and established, malice proven, insults shown, or wherever the facts exhibited a wanton and reckless disregard of the

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injured party's rights and feelings. We confess that the first examination of the statute very much inclined us to accept this contention. Mature reflection and a careful examination of the authorities have led us to believe this construction unwarranted by the terms of the act, and that it would be a construction which, followed to its legitimate conclusion, would lead to a legal absurdity. This we shall proceed to demonstrate more by the logical process known as the *reductio ad absurdum* than by the more usual course of an argument on the facts supported by the citation of authority. To bring about this result, we need only state a principle recognized by all the authors who have written on the law of torts, and recognized by all the decisions wherein the subject has been considered, and applied to the class of cases to which we shall refer. To begin with, if we concede that exemplary damages are recoverable in all civil actions sounding in tort for wrongs done to the person, to personal property, or to realty, it further appearing that the circumstances show the elements which the statute makes conditions precedent to their recovery, we shall run up against, and be compelled to overthrow, a principle which is probably as well settled as any in the law. Ever since 1818, at least in this country, it has been the law that exemplary or punitive damages cannot be awarded except against one who has participated in the offense. The *Amiable Nancy*, 3 Wheat. 546, 4 L. Ed. 456. The rule was reiterated and reaffirmed in the only case to which we shall hereafter refer on the main question under consideration. All the cases discussing the question proceed on the hypothesis that punitive damages are not awarded by way of compensation to the sufferer, but are visited as a punishment on the offender, and to serve as a warning to subsequent wrongdoers. Such being the fundamental basis of the doctrine, it has always been adjudged, and we have been cited to no case, and know of none, wherein a principal has been held liable for exemplary damages because of the wanton and oppressive act or of the malicious intent of his agent. Numerous instances

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could be easily cited which would instantly suggest to the professional mind the folly of holding that a principal can be thus mulcted for the act of his agent which were not committed under his express mandate, unless he subsequently confirmed and ratified them. If the warehouseman sends his teamster to deliver goods, and he recklessly, and in wanton disregard of another's rights, takes advantage of a situation, runs into his neighbor, and smashes his wagon, and the neighbor be hurt, the warehouseman doubtless may be compelled to compensate the injured party, but he could never be made liable to punitive damages because the wrong done was recklessly done by his servant, even though he was then engaged in the performance of a duty which the master had laid on him. If the driver of a milk wagon, in a reckless attempt for speedy service, or because of anger and malice entertained against a rival driver, runs into him, and occasions damage to either the driver or the owner's property, the servant being then engaged in the performance of his duty, the principal is doubtless liable to make the other whole, and compensate the driver for his personal injuries, but he could not be punished for the wrong which the servant committed. If the holder of a chattel mortgage delivers the instrument to an agent, and tells him to take possession of the property, which he may lawfully do on its maturity, and the agent, in the performance of his duty, wantonly executes it in reckless disregard of the other's rights, and subjects the mortgagor to insult, even though he may do it with malice, the innocent mortgagee, having given no commands to that end, nor having afterwards confirmed the acts of his agent, might be held liable for any injury done to the mortgagor, but he could not be mulcted in exemplary damages because of the method of the agent's performance, or the malice by which he was actuated. The plowman sent by the farmer to plow a field might, by careless and reckless disregard of the adjacent proprietor's rights, work serious injury to his orchard or to his ditch, yet, no matter what might be the circumstances attending the performance by the servant of the duty, the master could

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only be held to respond for the actual damages sustained, unless there was something in the terms of the order, the necessary or implied method of its performance, or the subsequent adoption of the acts, which would charge him with responsibility for the character of the servant's acts.

These illustrations might be multiplied indefinitely, and each as fully and as strongly exhibit a case wherein exemplary damages could not be assessed. Notwithstanding this, it would still follow, if we accept the natural language of the statute, and the construction insisted on by the appellee, that such damages might be recovered because the suit was a civil action. It was brought for a wrong done to the person, or for an injury to personal or real property, and the wrong and the injury were attended by circumstances showing some one or more of the conditions precedent nominated in the statute. All this being true, it follows the statute is to be interpreted according to the rules and principles of law applicable to such actions, and we must therefrom gather and determine whether within the law of tort we can find a principle which controls the question of recovery in certain classes of actions to which the statute can be applied. Otherwise we should be doing violence, not only to the principle of the strict construction of an act, but the other co-ordinate and equally controlling one, that a statute is to be construed in the light of the circumstances of its enactment, the wrong it was intended to remedy, and the relief which it was intended to afford. As we look at it, the legislature did not intend to enact into a statute the broad principle that exemplary damages might be recovered in all actions of tort for an injury either to the person or to personal or real property. It would be gravely doubtful whether an act in this broad form and of this far-reaching scope would not be violative of well-settled constitutional principles. This we need not consider, for evidently the legislature had no such purpose and no such object in view when they passed the law. It provided that under certain circumstances these damages might be assessed. This was

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in accord with well-settled principles of law, which have long been recognized, though, according to many decisions, of doubtful expediency and propriety. In attempting to define and limit the word "all," appearing in the first line of the section, the legislature said these damages could only be recovered where the wrong done was accompanied by certain circumstances. We may look now to the words used by the legislature in order to determine the circumstances under which such damages are promptly assessable. The words adopted by the legislators are common and familiar ones, having a definite signification in ordinary parlance, and they require no construction to ascertain their force or their meaning. The words are "fraud, malice, insult, wanton or reckless disregard of the injured party's rights." It must occur to every thinker and to every lawyer, when he considers the phraseology of the act, that these words are commonly used only in reference to an individual who commits a wrong, or who is in some way an actor in the wrong, either by direct performance, or by what would make him equally responsible, as where the agent may have been authorized to act under a mandate which either directly or by implication warrants him to act in the manner in which he has performed, or that which is equally available, where the principal afterwards confirms what has been done by the representative. If one brings a suit, and alleges fraud, he must, of necessity, establish the commission of that thing by the one whom he selects as a defendant. If he would recover damages because of the malicious act of another, it must be the malicious act of him who is sued. It is clearly settled that there can be no wanton and reckless disregard of an injured party's rights except by the one who exhibits it in the commission of the wrong which is the subject-matter of the action. It is for this reason, and this only, that the courts have always held that the principal is not liable for such damages where the act has been done by his agent without authority directly or impliedly given, or he has not subsequently adopted the act. Such damages are justifiable

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only in an action against the wrongdoer, and not in actions against those who are only consequentially liable because of their relation to the offender. The Prentice Case, to which we shall refer, fully illustrates this doctrine, and cites many cases in support of it which are enough for the purposes of this opinion, and which can be referred to by those who are seeking the basis of its support. As was said in a well-considered case, *Haines v. Schultz*, 50 N. J. Law, 481, 14 Atl. 488, approved in *Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97: "The right to award them rests primarily upon a single ground,—wrongful motive. It is the wrongful personal intention to injure that calls forth the penalty." I could multiply authorities and add numerous quotations in support of this principle, but it would in no measure add to the force and strength of the opinion or to the reputation of the author. I should only be guilty of prolixity, which is a judicial vice. We therefore conclude the legislature did not intend to enact that in all civil actions for wrongs done to the person or to property exemplary damages might be assessed, but only in those cases where the circumstances show fraud, malice, insult, or a wanton, reckless disregard of the injured party's rights or feelings. We also conclude, on well-settled principles, this can only occur where the suit is brought directly against the wrongdoer, who alone can exhibit the intent, and to whom alone can be imputed, and against whom only can be proved, the fraud, the malice, the insult, or the wantonness which is a condition precedent to the assessment of such damages. The statute, therefore, does not extend to actions brought against a principal for wrongs committed by his servant, unless the record exhibits a mandate from which the authority to thus act can be deduced, or the principal afterwards confirms what has been done.

Liability of Master for Malicious or Wanton Acts of Employee—Punitive Damages—Statute.

Such being our conclusion, we are next to determine whether the statute can be deemed applicable to suits brought against corporations for the acts of its agent.

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Whether this could or could not have been done under the law prior to the statute is a vexed, disputed, troublesome, indeterminable question. The only thing that the court to which the question is presented can do is to accept that line which commends itself to their judgment, and the one which, as they conceive, is the most strongly supported by the most cogent reasoning of courts whose decisions control, if they do not entirely satisfy, the judgment of the deciding tribunal. As we suggested at the outset, counsel have presented both lines, and no leading or controlling case has been overlooked by either. We confess that we pay little heed to the views of authors, however distinguished, unless they are supported by what we regard as the controlling authorities. Bias, professional training, and antecedent experience largely influence their discussion, and it would be unwise for courts to permit themselves to be much influenced by anything other than the particular reasons which they may have been able to cull from the decisions, and possibly, in a few instances, evolve from their own consideration. It is quite possible the judicial decisions of the various states may be nearly equal in number and in force, and may occupy the same plane of judicial distinction. This we do not propose to determine, though the matter is urged as an argument. Speaking for myself principally, but being entirely authorized thereunto by the entire court, I desire to emphasize the position which I have often taken, that wherever there is a debatable question, and there are two lines of authority, and one is supported by the supreme court of the United States, and the other condemned by it, we accept the decision of that tribunal. Adopting the language of that court, the inquiry suggested is "Can a railroad corporation be charged with punitive or exemplary damages for the illegal, wanton, oppressive conduct of a conductor of one of its trains towards the passenger?" It was answered in the negative. The opinion was supported by a copious citation of the leading

Same—Same.

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authorities. It was a full and elaborate examination of the whole subject, and, in the light of the principles on which the doctrine permitting punitive damages to be assessed is declared, the court adjudged the rule inapplicable in suits against a railroad corporation for the acts of its agents. Considering that the right rests on the proof of intent, the learned court decided such damages were not recoverable in this sort of an action, and under these circumstances, against a railroad company. *Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97.

When we conclude the statute neither directs nor permits the assessment of such damages against a principal for the wrong done by his agent, as we have already demonstrated, it follows the same rule should be applied, the same principle invoked, and the same result reached, in an action brought against a railroad company, when the basis for the assessment of exemplary damages is to be found only in circumstances showing fraud, malice, insult, or reckless disregard of consequences by the agent, in which the employer, the railroad company, could not participate. Admitting always the exception unless there be some order, direction, or affirmance which is a prerequisite in the case of a suit against an individual principal, the rule must be the same in both cases. We therefore conclude for these reasons the court erred in its instructions to the jury. It is quite true in *Tramway Co. v. Cloud*, 6 Colo. App. 445, 40 Pac. 779, there may be found expressions which would seem to indicate it was the conviction of the court, or, at least, of the author, that such damages might be recovered in this class of actions. The question, however, was neither presented nor argued as it has been in this case, nor did the court undertake to decide it. What was said was the result more of a cursory suggestion than the result of an elaborate and careful examination, which this case has received.

If we had not reached this conclusion respecting the law, we are very frank to say that a careful examination of the

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record and of the testimony would lead us to hold that there was no sufficient evidence of either fraud, malice, or insult, or of a wanton disregard of Blocker's rights, to permit the submission of the question to the jury. JUDGE THOMSON expresses no opinion on the rule heretofore discussed and laid down, but puts his concurrence on this precise ground. There was a dispute between Blocker and the conductor. It is a matter of considerable doubt under the testimony, regardless of the verdict of the jury, whether Blocker tendered his fare prior to the time that the conductor stopped the train or pulled the bell to stop it. Whichever might be true, we do not believe the conductor exhibited any malice or insulted Blocker, or that he acted with a reckless disregard of his rights. If he put him off by reason of the misunderstanding, and if he failed to apprehend that Blocker intended to tender him his fare, it would not necessarily follow punitive damages could be assessed. Blocker was undoubtedly attempting to ride without paying his fare. He was insisting on his right to ride on his membership in the Brotherhood of Railway Trainmen. He was likewise endeavoring to compel the conductor to hold his money as security until he got to the Springs, to avoid the payment of \$1.60, which, if it had been promptly tendered, would have undoubtedly been received, a receipt given to him for it, and thereon he could have recovered the money, if he was entitled to ride free. There is enough in the case to lead us to believe this question ought never to have been submitted to the jury. We should have put the decision on this ground alone, and refused to discuss the other, but for the fact that the principal inquiry is legitimately suggested by the instructions, and is so earnestly pressed on our attention for decision by both counsel that we felt it our duty to determine it, rather than to evade it and place our decision on the latter basis. For the reasons heretofore expressed, this judgment must be reversed, and the case sent back for a new trial. Reversed.

Ejection of Passenger—Malice and Wantonness—Sufficiency of Evidence.

Fluhrer v. Lake Shore & M. S. Ry. Co

FLUHRER

v.

LAKE SHORE & M. S. RY. CO.

(*Supreme Court of Michigan, June 18, 1900.*)

Injury to Brakeman—Violation of Rules—Customs.*—Where a rule of a railroad company prohibiting brakemen from going between cars in motion to uncouple them has been violated by its brakemen, customarily and notoriously, the rule must be deemed to be abrogated.

ERROR by defendant to Lenawee county circuit court.
Affirmed.

C. E. Weaver (*Geo. C. Greene* and *O. G. Getzen-Danner*, of counsel), for appellant.

Watts, Bean & Smith, for appellee.

MOORE, J. This case has been here once before, and is reported in 17 Am. & Eng. R. Cas., N. S., 463, 80 N. W. 23. Upon the second trial, plaintiff recovered a verdict. The case is brought here by the defendant by writ of error.

The counsel for defendant argue over again in their brief the questions passed upon when the case was here before. We do not think any further reference is necessary to that feature of the case. The case was sent back for trial upon a single point, in relation to which the court declared the law to be as follows: "It is well settled that a violation of the rules of the company will defeat recovery. The exception to this is where the company itself has sanctioned the custom of their employees to act in violation of the rules, and has thus virtually abrogated them. This exception is based upon the theory that it would be unjust in employers to establish rules, and then sanction their violation, interpose

*See notes, 17 Am. & Eng. R. Cas., N. S., 430 *et seq.*

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such violation as a defense. *Hunn v. Railroad Co.*, 78 Mich. 513, 526, 44 N. W. 502, 7 L. R. A. 500; *Eastman v. Railway Co.*, 101 Mich. 597, 602, 60 N. W. 309. Fairly construed, the above rule is notice to brakemen not to enter between the cars, while in motion, to uncouple them, and an agreement not to do so. The danger in doing so is apparent. Only when this rule is violated by brakemen so universally and notoriously that it is a fair inference that the company sanctioned and approved the violation is the company barred from this defense. The court instructed the jury that, if they believed that the motion of the cars was so slow that it was not negligence to pass between them to uncouple them, and that such was the usual custom of brakemen under like circumstances, then such act would not necessarily prevent recovery by the plaintiff. There was evidence tending to show that it was usual and customary for brakemen to pass between the cars, while in motion, to uncouple them. The case was not submitted to the jury upon the theory that the company had sanctioned a violation of this rule. The question was not referred to in the instructions. * * * When the defendant had entered into the contract with the deceased, in which he acknowledged a receipt of a copy of these rules, and agreed to abide by them, it had met the plaintiff's case, even though it was not negligence *per se* to go between the cars when in motion. The *onus probandi* was then cast upon the plaintiff to show that the company sanctioned a departure from the rule by a custom so universal and notorious that the company was presumed to have had knowledge of it, and to have ratified it. This is an important feature of the case, and was not, we think, by the instructions, properly submitted to the jury. Counsel for plaintiff urge that the evidence does not show that Fluhrer ever read or saw these rules. The production of the duplicate contract signed by him was *prima facie* proof that he had received and read them. If there was a conflict of testimony on this point, it should be submitted to the jury under proper instructions." Upon the second trial testimony was given in relation to the cus-

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tom of the employees about going between the cars, when in motion, to couple them. The jury were properly instructed in accordance with the law as stated by the court when the case was here before, and the jury rendered a verdict in favor of plaintiff. Judgment is affirmed. The other justices concurred.

TUCKER

v.

CHICAGO & G. T. RY. CO.

(*Supreme Court of Michigan, Dec. 2, 1899.*)

Crossings—Failure to Look and Listen—Negligence.*—Where plaintiff's failure to look and listen for trains, while approaching a country highway crossing, contributed to his injury by a train while crossing the railroad, there can be no recovery for his injury, although the statutory signals were not given, and plaintiff knew that the schedule time of the train was past.

ERROR by defendant to Eaton county circuit court.
Reversed.

About three-quarters of a mile westerly of Bellevue station, plaintiff, while riding in a top buggy, drawn by two gentle horses, with its sides and back closed, was struck upon the highway crossing by the defendant's fast train, running at the rate of from 45 to 55 miles an hour. His daughter (15 years old) and his horses were killed, and he was seriously injured. For this injury he brought suit, and recovered a verdict upon the ground that the statutory signals were not given. Defendant's roadbed runs in a southwesterly direction. The highway approaches it from the north and east at an acute angle. Plaintiff was driving westerly, and the train was westward bound. Plaintiff testified: That

*See *Hunter v. Montana Cent. Ry. Co.* (Mont.), 16 Am. & Eng. R. Cas., N. S., 615; *Swanson v. Cent. R. Co.* (N. J.), 16 *Id.* 624; *Crawford v. Chicago G. W. Ry. Co.* (Iowa), 16 *Id.* 628.

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when about 93 feet from the track he stopped, looked, and listened, and neither heard nor saw a train. He walked his horses a few feet, and then started them in a trot at a gait of about 5 miles an hour, and neither saw nor heard the train, nor heard any signals, before he was struck. That he sat upon the right of the buggy, and his daughter upon the left, towards the approaching train. That he was familiar with the crossing, and regarded it as a dangerous one. That he told his daughter to keep watch. That she leaned forward, with one hand on the dashboard, looked in the direction of the approaching train, but gave no notice to him of its approach. The hearing and the eyesight of both were good. It is demonstrated by the plaintiff's own evidence that, at a point 100 feet northerly in the highway from the center of the track, one could see a man on the track 825 feet easterly of the crossing, and a train or engine 1,073 feet from the crossing. According to the defendant's testimony, from actual experiments, the train would be visible for about 1,500 feet. It is also conclusively established that at any point in the highway within 75 feet of the crossing the train was plainly visible as far as the station.

E. W. Meddaugh (*Geer & Williams*, of counsel), for appellant.

Powers & Stine, for appellee.

GRANT, C. J. (after stating the facts). Plaintiff himself did not look or listen while going 93 feet. A look at any time within 75 feet would have disclosed the coming train. Either his daughter did not look, or, if she looked, gave no warning. That she could have seen is unquestioned, for there was nothing to obstruct her vision. Defendant was running its cars at a lawful rate of speed. It was in the country. There was no occasion for slacking speed until some danger was apparent. The fact that the train was late is immaterial. Travelers are charged with notice of the fact that trains are often behind time, and their

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duty to look and listen is not lessened by the fact that the schedule time of a train is past. The case is clearly within the following decisions: *Grostick v. Railroad Co.*, 90 Mich. 594, 51 N. W. 667; *Gardner v. Railroad Co.*, 97 Mich. 240, 56 N. W. 603; *Osburn v. Railway Co.*, 115 Mich. 102, 72 N. W. 1114. In those cases other authorities are cited. See, also, *Artz v. Railroad Co.*, 34 Iowa 153; *Railway Co. v. Frazee*, 150 Ind. 576, 50 N. E. 576; *Railway Co. v. Pounds*, 27 C. C. A. 112, 82 Fed. 217; *Railway Co. v. Smith*, 30 C. C. A. 58, 86 Fed. 292. Judgment reversed, and a new trial ordered. The other justices concurred.

DOTTY

v.

ATLANTIC CITY R. CO.

(Court of Errors and Appeals of New Jersey, June 18, 1900.)

Crossings—Contributory Negligence Inferred.*—D., sitting on the seat of a one-horse buggy wagon, having its top down, and with no side curtains, drove his horse upon the tracks of a railroad crossing, and was struck and killed by a passing passenger train. *Held*, that he was guilty of contributory negligence, to be inferred from these conditions of fact, *viz.*: If he took the precaution to look before attempting to cross, even though he did not stop, he had, at a distance of more than 30 feet from the track on which the approaching train was running, an unobstructed view of it for about two-fifths of a mile, for a period of time sufficient to enable him to stop his horse before reaching the tracks, and escape the danger.

(Syllabus by the Court.)

ERROR by defendant to supreme court. *Reversed.*

K. Willard Morgan and *Charles V. D. Joline*, for plaintiff in error.

Henry S. Scovel and *W. F. Boyle*, for defendant in error.

VREDENBURGH, J. At the jury trial of the action brought by the representative of the intestate to recover damages from

*See notes, 12 Am. & Eng. R. Cas., N. S., 414 *et seq.*

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the railroad company for the death of Henry Dotty, caused by his collision with the company's train, the trial justice denied the defendant's motion for a nonsuit, based upon the ground of contributory negligence. Exception having been duly sealed and errors assigned, the correctness of this ruling is before us for review. If the proved circumstances, as they existed at the time of this motion, make the inference irresistible that in his attempt to drive over this surface crossing the intestate did not exercise such prudence as the law demands, the motion should have been granted. Those circumstances, so far as material, were these: On the afternoon of September 21, 1898, the deceased was driving on the Warrick road, in a northeasterly direction, on his way to Magnolia Station, in the country of Camden, N. J., a horse attached to an open one-seated buggy wagon, having no side curtains, and with its top down, and, in attempting to cross the defendant's tracks at their intersection by the Warrick road, was struck by a passenger train of cars, and killed. Warrick road is a public highway 60 feet wide, and its intersection with the westerly side of the right of way of the defendant is distant, under the weight of the evidence, about 35 feet westerly from the place of the collision. Growing corn from 10 to 12 feet high stood about 6 feet westerly of defendant's right of way, measuring from the west side of that right of way. I think it is clear from the evidence that a person, whether walking or driving in an open wagon, at the westerly edge of the defendant's right of way could see in the direction of Magnolia Station—the direction from which the train in question was coming—about two-fifths of a mile. So that if the deceased, approaching the crossing without stopping, and while even so near as 7 feet from it, had looked up and down the tracks, he must have seen the coming train, wherever it then was, before his horse's head had come within about 17 feet of the western track, and in time to stop his horse, and avoid being struck by the train. The train could not have been running so fast that he could not see it. If it was running at the rate of 5

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miles in 4 minutes (as stated in the brief of counsel of the defendant in error,—a mile in 48 seconds), then it would take it at least nineteen seconds to reach the crossing after it was first observed by a person looking out for it from the point above referred to. There is no evidence that the horse was not under control, and it would seem the conclusion is irresistible that had the deceased exercised the reasonable degree of prudence which the law requires on his approach to this "place of known danger,"—to use the apt expression of the opinion in *Swanson v. Railroad Co.* (N. J. Err. & App.) 44 Atl. 852, 16 Am. & Eng. R. Cas., N. S., 624,—in looking along the track as he drove towards the crossing, he would have seen the train before it became too late to avoid being struck. His failure so to look has cost one life, but sympathy for that loss should not lead us to forget that his negligence might have cost many lives, nor induce us to relax the rules of law which, in this era of the public demand for rapid transportation of both passengers and freight, may protect the lives of countless others. In *Railroad Co. v. Righter*, 42 N. J. Law 180, where it appeared that the driver's field of observation of the tracks was confined, by obstructions, to a point within 30 feet of the track upon which the accident occurred, it was held by this court that a nonsuit should have been granted by the trial court. That decision has been followed by many others approving it, to which it is unnecessary here to refer. The judgment below should be reversed.

WALKER *et al.*

v.

MERCER.

(Supreme Court of Kansas, April 7, 1900.)

Crossings—Obstructions on Right of Way—Negligence—Question for Jury.*—The question whether the maintenance upon a

*See note at end of case.

Note

railroad right of way, at a highway crossing, of obstructions to the sight of passing or crossing travelers is negligence, is one for the jury, and not for the court.

ERROR by defendant from Northern department Eastern division court of appeals. *Reversed.*

A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiffs in error.

Dail & Bird, for defendant in error.

PER CURIAM. This was an action to recover damages for injuries alleged to have been negligently inflicted by the railroad company at a highway crossing. A verdict was rendered in favor of the plaintiff. The jury made answers to special questions. Upon the findings embodied in the questions and answers, the common pleas court of Wyandotte county rendered judgment for the railroad company, notwithstanding the general verdict. The plaintiff prosecuted error to the court of appeals. That court reversed the judgment of the common pleas court, and from the judgment of reversal the railroad company has prosecuted error to the court.

The findings of the jury bring the case fully within the principle announced in *Railroad Co. v. Willey*, 61 Kan. —, 6 Am. & Eng. R. Cas., N. S., 565, 58 Pac. 472. The common pleas court was right. The court of appeals was wrong. The judgment of the last-named court is reversed, and that of the common pleas court is affirmed.

SMITH, J., not sitting; having been of counsel in the case.

NOTE.

Crossings—Obstruction of View—Negligence.—It is not negligence *per se* for a company to leave cars upon a side track in the thickly settled portion of a city so as to obstruct the view of persons who have to cross the track; but where a jury finds that it was negligence, their finding will not be disturbed when supported by evidence. *Houston & T. C. R. Co. v. Stewart* (Tex.), 17 S. W. Rep. 33; *Klotz v. Winona, etc., R. Co.*, 68 Minn. 341; *Galveston, etc., R. Co. v. Michalke*, 90 Tex. 276; *Missouri, etc., Ry. Co. v. Rogers* (Tex.), 8 Am. & Eng. R. Cas., N. S., 141; *Chicago, R. I. & P. R. Co. v. Williams*, 56 Kan. 333, 43 Pac. Rep. 246.

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PETERSON

v.

ST. LOUIS, I. M. & S. RY. CO.

(*Supreme Court of Missouri, June 12, 1900.*)

Crossings—Failure to Look and Listen—Speed Prohibited by Ordinance.*—Where a person's failure to look and listen before crossing a railroad track in a city street contributed directly to his injury by a train, there can be no recovery for his injury, although the train was running at a rate of speed prohibited by an ordinance of the city.

APPEAL by plaintiff from St. Louis circuit court. *Affirmed.*

This is an action by plaintiff, the widow of Henry Peterson, deceased, against the defendant, for \$5,000 damages for the death of her husband, which is alleged in the petition to have occurred in the city of St. Louis on the 30th day of November, 1896, while he was walking along on Ivory street, by reason of the negligence of defendant in running its train of cars over him without ringing its bell, and while running its train at a rate of speed in excess of that which is allowed by the ordinance of said city. The answer was a general denial and a plea of contributory negligence on the part of the husband of plaintiff. The accident occurred at the point where defendant's road crosses Ivory street. At this point Ivory street runs northeast and southwest, while defendant's parallel railroad tracks run nearly east and west. Trains moving east at this point occupy the north track, while trains moving west occupy the south track. Just east

*See note, 10 Am. & Eng. R. Cas., N. S., 717; Crawford v. Chicago G. W. Ry. Co. (Iowa), 16 *Id.* 628; Schug v. Chicago, M. & St. P. Ry. Co. (Wis.), 15 *Id.* 705; Chicago & A. R. Co. v. Winters (Ill.), 12 *Id.* 93; Schneider v. Chicago, M. & St. P. Ry. Co. (Wis.), 11 *Id.* 81.

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of Ivory street the Kirkwood Branch of defendant's road joins the main line on the south. After dark on the evening of November 30, 1896, plaintiff's husband was going in a northerly direction on said street, and immediately after crossing the tracks of the Kirkwood Branch a freight train going east passed, while at the same time a passenger train on the main line going west, running at the rate of about 25 to 30 miles per hour, came up. In the meantime deceased had stepped upon the north track, in front of a passenger train going west, and about the time he was to take the last step off of the track he was struck by the engine of the passenger train and killed. The whistle on the passenger train had been sounded for the crossing of Ivory street some two or three blocks before reaching it. When the engineer in charge of the locomotive first saw deceased he was about 30 feet from Ivory junction crossing. He was then crossing the track in front of the train from the west side or south side onto the east side. The engineer immediately put on the brakes, sounded the danger signal three or four times, and did everything that he could to prevent the accident. The train ran about 400 feet after the accident before it stopped. The railroad track east of Ivory street is comparatively straight for about 1,500 feet, but just west of this street it curves to the north. The track is nearly about level at this crossing. At the time of the accident the train was running at the rate of 30 miles per hour, while by the ordinances of the city the maximum rate of speed of steam cars was 20 miles per hour.

The court, at the instance of plaintiff, instructed the jury as follows: "(1) The court instructs the jury that if you believe, from the evidence, that Henry Peterson, the husband of the plaintiff, was by the defendant's locomotive struck and killed while crossing said defendant's road at or near the crossing of Ivory street, in the city of St. Louis, and that said striking and killing were the result of and occasioned by the negligence or unskillfulness of the servants, engineer, or employees of the defendant conducting and managing said locomotive, they will find for the plaintiff \$5,000 in damages:

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provided, they further believe that deceased's contributory negligence, if any, did not directly contribute to said injury; and the burden of showing such contributory negligence on the part of the deceased is upon defendant. (2) Although the jury may believe from the evidence that Peterson was negligent in crossing the railroad track immediately in front of an approaching train, still he had a right to presume that defendant would obey the law, and not run its train more than twenty miles per hour. (3) The court instructs the jury that if you believe from the evidence that Henry Peterson, at the time he was killed, was the husband of plaintiff, and that said suit was brought within one year after the death of said Henry Peterson; and if you shall further believe from the evidence that the place where said Henry Peterson was struck by defendant's train was at or near a public crossing of defendant's railroad in the city of St. Louis, Missouri, and that the track was straight and level for a distance of, to wit, 1,500 feet from the east; and if you believe that said Henry Peterson, while crossing or attempting to cross defendant's said track, became in imminent peril of being struck by defendant's said train, and defendant's employees in charge of said train became aware of his peril of being struck in time to have enabled them, by the exercise of ordinary care, to have stopped said train, and to have averted the injury to deceased; or if you believe from the evidence that said employees in charge of said train, by the exercise of ordinary care, could have become aware of his peril in time to have stopped said train, and to have averted said injury to said deceased; and if you believe that they failed to exercise such care and stop said train, and that by reason of said failure to exercise said ordinary care the said train was not stopped, and the said Peterson was struck and killed,—then the jury must find for the plaintiff, although you may believe that the deceased, Henry Peterson, was guilty of negligence in attempting to cross said track in front of the approaching train."

On behalf of defendant and over the objection and excep-

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tion of plaintiff, the court instructed the jury as follows: "(1) The court instructs the jury that if they believe from the evidence that there were crossing gates at the sides of the tracks of the Oakhill Railroad where it crossed Ivory avenue at the time of Henry Peterson's injury, and that said gates were down at the time the train by which he was struck was passing over said street, then defendant had the right to run its said train at a speed of twenty miles per hour over said street; and if you believe from the evidence that said train was not running at a greater rate of speed than twenty miles an hour while approaching and crossing said street, your verdict will be for the defendant. (2) The court instructs the jury that, although they may believe from the evidence that the death of Henry Peterson was caused by defendant's negligence, yet if you further believe from the evidence that said Henry Peterson was guilty of negligence in going upon or walking upon defendant's track in the way he did, your verdict will be for the defendant. (3) The court instructs the jury that, although they may believe from the evidence that the train by which Henry Peterson was struck was running at an unlawful speed at the time he was struck, yet if you further believe from the evidence that said Henry Peterson could, by looking or listening, have seen or heard the approach of the train before stepping or while walking on defendant's track, in time to have avoided contact therewith, and did not do so, your verdict will be for the defendant. (4) The court instructs the jury that if they believe from the evidence that the death of Henry Peterson was the result of mere accident or casualty, and not of negligence on defendant's part, your verdict will be for the defendant. (5) The court instructs the jury that it is the duty of a person who is about to step upon a railroad track to look and listen for approaching trains in both directions, and if you believe from the evidence that at the time Henry Peterson stepped upon the track on which he was struck he could, by looking, have seen, or, by listening, have heard, the approach of the engine by which he was struck, and avoided a contact there-

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with, but did not so look and listen, and was killed in consequence thereof, your verdict will be for the defendant. (6) By mentioning the 'burden of proof' and 'preponderance of evidence' the court intends no reference to the number of witnesses testifying concerning any fact, or upon any issue in the case, but simply by way of briefly expressing the rule of law, which is that, unless the evidence (as to such issue) appears, in your judgment, to preponderate, in respect of its credibility, in favor of the party to this action on whom the burden of proof (as to such issue) rests, then you should find against such party on said issue."

Under the evidence and instructions of the court, the jury returned a verdict for defendant, and, after unsuccessful motion to set the same aside and for a new trial, plaintiff appeals.

H. M. Pollard, for appellant.

Martin L. Clardy and *Henry G. Herbel*, for respondent.

BURGESS, J. (after stating the facts). The errors assigned are the refusal of instructions asked by plaintiff, in compelling plaintiff to modify her instructions numbered 1 and 2, in giving instructions on the part of defendant, and in giving conflicting instructions. From the view we take of this case, we are of the opinion that it would serve no useful purpose, and be entirely unnecessary, to pass upon either of these questions; for, whatever might be our opinion with respect thereto, there is no escape from the conclusion that deceased was guilty of such gross and inexcusable negligence in going upon the railroad track in front of the train at the time and under the circumstances as to preclude a recovery on account of his death. While the law permits a recovery against a railway company by a person who sustains injury by reason of the negligence and mismanagement of its train of cars, it is only when the injured party is not guilty of negligence contributing directly to his own injury that a recovery for damages is permitted. Upon this question plaintiff's counsel, in his brief, says: "There can't be any question in the mind of any human being that it was negligent for Peter-

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son to go on the track. The result proved it beyond a peradventure." But it is insisted that, notwithstanding his negligence, if the train was running at a rate of speed in excess of that prescribed by the ordinances of the city, and, but for that fact, defendant's agents and servants in charge of the train could have stopped it in time to have averted the injury after they saw deceased upon the track, it was their duty to do so, and that this was a question for the jury. But there was no evidence to justify a recovery upon this theory of the case. In fact, the evidence was all the other way, and showed that after those in charge of the train saw deceased on the track they did everything in their power to stop the train and prevent the injury, but that it was impossible to do so. That they sounded the danger signal, and put on the brakes, and had just before that sounded the whistle for the crossing, was clearly proven. The engine was within 30 feet of deceased when the engineer saw him on the track, and the evidence showed that it was impossible to have stopped or checked the train, even if it had been running at the rate of speed fixed by ordinance, in time to have prevented the injury. It is evident that if deceased had been looking he could have seen the approaching train, and it has always been held by this court that it is the duty of a person crossing a railroad track to look and listen for trains in order to avoid injury to himself, and, if he fail to do so, and is injured in consequence thereof, he is guilty of contributory negligence. *Boyd v. Railway Co.*, 105 Mo. 371, 16 S. W. 909. In *Watson v. Railway Co.*, 133 Mo. 246, 34 S. W. 573, it was held that one who knowingly crosses a railroad track in such close proximity to a moving car as to be struck before he can cross cannot, because of his contributory negligence, recover for injury by him received. *Maxey v. Railway Co.*, 113 Mo. 1, 20 S. W. 654. The judgment was manifestly for the right party, and should be affirmed.

GANTT, P. J., and SHERWOOD, J., concur.

Louisville & N. R. Co. v. Behlmer

LOUISVILLE & NASHVILLE RAILROAD COMPANY *et al.*

v.

BEHLMER.

(*Supreme Court of the United States, Jan. 8, 1900.*)

Interstate Commerce Act—Continuous Line.*—Several railroads transported hay from Memphis, Tennessee, under through bills of lading, by continuous carriage, to Summerville and Charleston, South Carolina. The several roads shared in an agreed rate on traffic to Charleston and in a precisely equal in amount rate on traffic to Summerville. On shipments to the latter, however, there was added to the Charleston rate the amount of the local rate from Charleston to Summerville, the benefit of which additional exaction was solely received by the local road on which Summerville was situated. *Held*, that such railroads, under such circumstances, constituted a continuous line bringing them within the control of the Act to Regulate Commerce.

Same—Dissimilarity of Circumstances and Conditions—Absence of Previous Assent of Commission.—Under the 4th section of the Act to Regulate Commerce, competition arising from carriers subject to the act may create such dissimilarity of circumstances and conditions as will authorize a carrier, of his own motion, to charge a greater rate for a lesser than for a longer distance.

Same—Same.—Under the Act to Regulate Commerce competition not originating at the initial point of the traffic may create such dissimilarity of circumstances and conditions as to authorize a carrier, without the previous assent of the Interstate Commerce Commission, to charge a greater rate for a lesser than for a longer distance.

Precedents.—The contention that the action of the Interstate Commerce Commission and the Circuit Court of Appeals in the controversy involved in the case at bar was of such a nature as to render the previous rulings of the Supreme Court of the United States referred to inapposite, was without merit.

Scope of Decision.—The contention that the Interstate Commerce Commission and the Circuit Court of Appeals, although they may have expressed erroneous opinions as to the construction of the Act

*See *Blair v. Sioux City & P. Ry. Co.* (Iowa), 17 Am. & Eng. R. Cas., N. S., 363 and *note*, p. 379.

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to Regulate Commerce, yet, in substance, decided as a matter of fact, that the competition in question was of not sufficient weight to bring about dissimilarity of circumstances and conditions, was without merit.

Questions of Fact—Appeal—Review.—The Supreme Court of the United States will not, as a matter of first impression, weigh the evidence for the purpose of ascertaining whether it established such material competition as justified the carrier in concluding that dissimilarity of circumstances and conditions, within the meaning of section 4 of the Act to Regulate Commerce, was brought about.

APPEAL by defendants from decree of the Fourth circuit of the United States circuit court of appeals. *Reversed.*

Statement by MR. JUSTICE WHITE:

This controversy was commenced on December 29, 1892, when Henry W. Behlmer, a resident of Summerville, South Carolina, and a wholesale hay and grain dealer therein, began proceedings before the Interstate Commerce Commission, under the Act to Regulate Commerce, passed February 4, 1887, as amended, to restrain the continuance of acts asserted by him to be a violation of the statute referred to. The petition was filed by Behlmer on his own behalf, and that of other merchants, residents of Summerville, and the parties complained of were the Memphis & Charleston Railroad Company, the East Tennessee, Virginia, & Georgia Railroad Company, the Georgia Railroad & Banking Company (the owner of a railroad designated as the Georgia Railroad), the South Carolina Railway Company, and other companies and individuals, who were averred to be lessees or receivers of some of the above-named companies. All the lines of railroad mentioned were asserted to be members of a combination styled the Southern Railway & Steamship Association.

It was averred that the defendants were carriers under a common control, management, or arrangement for continuous carriage, and were engaged in the transportation of passengers and property wholly by railroad between Memphis in the state of Tennessee and Summerville in the state of South

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Carolina and through Summersville to Charleston. The distance between Memphis and Summerville was averred to be 748 miles, as follows: Between Memphis and Chattanooga, 310 miles over the Memphis & Charleston Railroad; between Chattanooga and Atlanta, Georgia, 152 miles over the East Tennessee, Virginia, & Georgia Railroad; from Atlanta to Augusta, Georgia, 171 miles over the Georgia Railroad; and from Augusta, Georgia, to Summerville, South Carolina, 115 miles over the South Carolina Railway. The principal subject of complaint was, that though Summerville was 22 miles west of Charleston and was that distance nearer to Memphis, where the hay and grain shipments originated, yet the defendants exacted from the petitioner and other merchants of Summerville a freight charge of 28 cents per 100 pounds for hay, carried from Memphis to Summerville, while only 19 cents per 100 pounds were charged for the same article when carried to Charleston, the longer distance. It was averred that the rate of 28 cents to Summerville was made up of the through rate to Charleston, with the addition of the local rate from Charleston to Summerville of 9 cents per 100 pounds. It was also alleged that the shipments of hay to Summerville were made over the same line, in the same direction as Charleston, and under substantially similar circumstances and conditions. The freight charges complained of were averred to be in violation of the 4th section of the Act to Regulate Commerce, commonly referred to as the long and short haul clause. Besides, it was alleged that the local rate between Summerville and Charleston of 9 cents per 100 pounds was excessive and unreasonable, and that such also was the case as regards the charge of 28 cents from Memphis to Summerville, and hence such charges were in violation of the 1st section of the Act to Regulate Commerce. It was also asserted that the discrimination and excessive rates against Summerville existed, not only on hay, "but on all articles of interstate commerce coming to that place, much to the detriment and disadvantage of the town and the business of its merchants."

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In their answers certain of the defendants conceded that they were subject to the Act to Regulate Commerce, while others, though admitting that they were common carriers and engaged in the transportation of passengers wholly by railroad between points in the states of Tennessee and South Carolina, averred that they had no joint through tariff from Memphis to Summerville, and therefore had no "line" from Memphis to Summerville, in the sense of the Act to Regulate Commerce, and were in consequence not affected by the statute. All the defendants averred that the aggregate freight rate on hay carried from Memphis to Summerville, as well as the local rates from Charleston to Summerville, were just and reasonable. By some of the defendants it was alleged that the transportation of hay from Memphis to Summerville was not done under substantially similar circumstances and conditions as the transportation of like property from Memphis to Charleston, and hence the carriers were justified in making a lesser charge to Charleston than was made to Summerville, the shorter distance. The dissimilarity alleged was asserted to have been caused, first, by the existence between Memphis and Charleston of at least eight competing lines of railroad, and second, by the competition by sea on hay and grain and freight of that class, originating in Chicago, New York, and eastern points and destined to Charleston via the lakes, canal, and ocean, and by part water and part rail. The exact condition of the competition existing at Charleston because of its situation on the seaboard and consequent relations with many markets other than Memphis, was stated in the joint and several answers of the Louisville & Nashville Railroad Company and the Central Railroad & Banking Company as follows:

"(Second.) Charleston is a port on the Atlantic coast, accessible and easily reached from the ports of Baltimore, Philadelphia, New York, Boston, and other eastern ports from which hay is shipped by water. If the rail lines from Memphis to Charleston charged rates to Charleston as high

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as the rate to Summerville, although the latter rate is in itself reasonable, no hay would be brought from Memphis to Charleston, but Charleston would be supplied with hay from north Atlantic ports and the railroads would lose the hay business and Memphis would lose a hay market.

"(Third.) The rates on western produce to Charleston and other coast cities, such as Savannah, Port Royal, and Brunswick, are made with a view to actual, existing water competition. Western produce, such as grain, hay, etc., distributed from Chicago, can reach Charleston through the ports of New York, Philadelphia, and Baltimore over continuous water routes via the lakes and canal or over combined rail and water routes.

"The all-rail lines seeking to do business between Chicago and Charleston and other coast cities are compelled to make their rates approximate those which are offered by the continuous water route or by the combined rail and water routes. The all-rail routes make their rates as much higher as the difference in the service will permit, and those rates are correspondingly adjusted from all western points, such as Evansville, Cairo, St. Louis, Memphis, etc. At present the all-rail rate from Chicago to Charleston on hay, for instance, is 33c. per 100 lbs.; from St. Louis, 28c.; from Louisville, Evansville, and Cairo, 23c.; and from Memphis, 19c.—the route through Memphis offering facilities for the transportation of hay, grain, and western products generally from the states of Missouri, Kansas, Nebraska, etc.

"The rate from Memphis to Charleston on hay is therefore forced upon the defendant lines by actual existing water competition and other competition beyond the control of defendant.

"The controlling element in said competition is the lake, canal, and ocean transportation between Chicago and Charleston; or the lake transportation from Chicago to Buffalo, or other lake port, thence by rail to New York, thence by ocean to Charleston; or rail transportation from Chicago to Balti-

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more, Philadelphia, or New York, thence by ocean to Charleston."

On the foregoing issues testimony was taken before the Commission, which entered an order requiring the defendants to desist on or before a date named from charging any greater sum in the aggregate for the transportation from Memphis to Summerville of hay, or other commodities carried by them, under circumstances and conditions similar to those appearing in the case, than was being charged for such transportation for the longer distance to Charleston. This order, however, stated that it was made without prejudice to the right of the defendants to apply to the Commission for relief under the 4th section of the Act to Regulate Commerce. The order not having been obeyed, Behlmer, as authorized by § 5 of the act of March 2, 1889 (25 Stat. at L. 855, Chap. 382), amending § 16 of the original act, filed his complaint in the circuit court of the United States for the fourth circuit, eastern district of South Carolina, against the defendants in the proceedings before the commission and the purchasers, assignees, and successors of some of them, praying that the court might enforce compliance with the order of the Commission. By stipulation the testimony taken before the Commission was used at the hearing in the circuit court, and by consent certain documentary evidence (consisting of railway agreements, tariffs, reports, etc.) was filed as additional evidence on behalf of the defendants.

The case was heard by the circuit court, and on January 22, 1896, the bill was ordered to be dismissed. 71 Fed. Rep. 835. The controversy was then taken by appeal to the circuit court of appeals for the fourth circuit, and that court reversed the judgment of the circuit court, and remanded the cause with instructions to render a decree substantially in accordance with the order made by the commission. 42 U. S. App. 581, 83 Fed. Rep. 898, 28 C. C. A. 229. A motion for a rehearing having been denied, the case was then brought to this court.

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Messrs. Ed. Baxter and Joseph W. Barnwell, for appellants.
Mr. Claudian B. Northrop, for appellee.

MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court:

The questions which arise on this record involve the consideration of several provisions of the Act to Regulate Commerce. 24 Stat. at L. 379.

The particular questions at issue and the aspect in which they arise will be best shown by first considering the action of the Commission, then that of the circuit court in reviewing the order of that body, and, thirdly, that of the circuit court of appeals in reversing the decree of the circuit court. The commission held, as a matter of fact, that the carriers so conducted their business as to constitute a through line within the meaning of the commerce act, and were therefore amenable to its provisions. It did not, however, consider whether the rates to Summerville and Charleston were just and reasonable, because it deemed it unnecessary to do so. The reason for this conclusion was stated as follows:

"If it shall appear in this case that the defendants violate the long and short haul clause of the law by keeping the higher rate to Summerville in force, it will be unnecessary to consider in this report whether the rate to Summerville is in violation of other provisions of the law. In that event the prohibition in the 4th section will afford all the reduction demanded in the complaint." 4 Inters. Com. Rep. 522.

When it approached the 4th section of the act, the Commission declined to weigh the evidence before it as to the existence of competition, except in so far as to enable it to determine that the evidence established that the competition relied upon by the carriers did not originate at the point of shipment, or if it did arise at such place it was alone engendered by the presence there of other carriers who were subject to the commerce law.

This determination of the Commission to restrict its examination of the evidence solely to the extent necessary to enable it to ascertain the source and inherent character, and not the

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materiality and substantiality, of the competition, and therefore to exclude wholly from view the latter considerations, was predicated on the conclusion that, as a matter of law, no competition, however great might be its influence on carriage and rate making, could be by the carrier taken into consideration, of his own motion, in determining whether a lesser sum would be charged for the longer than for the shorter haul, if such competition arose from the sources or was wholly of the character which it was found by the Commission the proof established the competition relied on to be. That is to say, the Commission concluded, as a matter of law, that it was unnecessary to weigh the facts for the purpose of determining the materiality and extent of the competition, because, however strongly the proof might demonstrate its potency upon traffic and rates, nevertheless it would be without efficacy to give rise to such substantial dissimilarity as would justify the carrier, of his own motion, to charge a lesser rate for the longer than for the shorter haul. Whilst this was held to be the law, at the same time it was decided that the character of competition, which from its very nature was decided to be inadequate to create such legal dissimilarity in the conditions as to justify the carrier, of his own motion, charging a lesser sum for the longer than that for the shorter haul, nevertheless might authorize the Commission to sanction the lesser charge if the facts were presented to the Commission and its previous sanction to making such charge was obtained. Therefore the right of the carrier to prefer to the Commission a request for authority to make the charge complained of, predicated upon the very grounds which were held insufficient to permit the carrier to do so, on his own motion, was fully reserved. The ruling was, then, this, that some kinds of competition, however material and substantial in their operation, were yet inadequate, for the purpose of creating dissimilarity in circumstance and condition, to justify the independent action of the carrier, although the identical conditions of competition might be sufficient to produce such dissimilarity as to justify the Commission, on

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application made to it for such purpose, to authorize the carrier to charge less for a longer than was exacted for a shorter distance. The Commission said in its report :

"There is no showing in this proceeding of competition by lines not subject to the Act to Regulate Commerce for the carriage of hay from Memphis to Charleston, and the fact that there may be competition for such traffic by lines which are subject to the act, or that hay may be carried to Charleston by various rail and water, or part rail and part water, routes from points other than Memphis, does not justify the defendant carriers in departing from the general rule of the 4th section upon their own motion. Such considerations may constitute reasons for applying to the Commission for relief under the proviso clause of that section, but for reasons stated in our decisions of the cases above cited they do not justify carriers in departing from the rule of the 4th section without such a relieving order. Water competition, to justify lower long-haul rates, must exist between the point of shipment and the longer-distance point of destination. *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.*, 3 Inters. Com. Rep. 682, 4 I. C. C. Rep. 744. One transportation line cannot be said to meet the competition of another transportation line for the carrying trade of any particular locality, unless the latter line could and would perform the service alone if the former did not undertake it. *Chattanooga Bd. of Trade v. East Tennessee, V. & G. R. Co.*, 4 Inters. Com. Rep. 213, 5 I. C. C. Rep. 546. The competition of markets, or the competition of carrying lines, subject to regulation under the Act to Regulate Commerce, does not justify carriers in making greater short-haul or lower long-haul charges over the same line without an order issued by the Commission on application therefor and after investigation. *Trammell v. Clyde S. S. Co.*, 4 Inters. Com. Rep. 120, 5 I. C. C. Rep. 324; and *Gerke Brewing Co. v. Louisville & N. R. Co.*, 4 Inters. Com. Rep. 267, 5 I. C. C. Rep. 596." 4 Inters. Com. Rep. 523.

The circuit court held that one of the defendants had not

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been served with process so as to cause any decree which might be rendered to be conclusive, and, moreover, decided that the proof did not establish that the carriers, in the matter complained of, were under a common control and management for continuous shipment, within the meaning of the act, and therefore they were not, as to such carriage, amenable to the provisions of the act. The court, however, proceeded as follows (71 Fed. Rep. 839) :

"But if we assume, for the sake of argument, that all the defendants are affected by this charge, does it violate the 4th section of the act above quoted? JUDGE COOLEY, in *Re Southern R. & S. S. Asso.*, 1 Inters. Com. Rep. 278, *sub nom.*; *Re Louisville & N. R. Co.*, 1 I. C. C. Rep. 57, says: 'The charging or receiving greater compensation for the shorter than for the longer haul is sure [seen] to be forbidden only where both are under substantially the same circumstances and conditions. And, therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its so doing will not alone convict it of illegality, since, if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated.' This is quoted with approbation by the United States circuit court, southern district California. *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 50 Fed. Rep. 295, 4 Inters. Com. Rep. 323.

"When, then, may the circumstances and conditions of the two hauls be said to be dissimilar? JUDGE COOLEY, in the same case, answers this question: 'Among other things in cases where the circumstances and conditions of the traffic were affected by the element of competition, and where exceptions might be a necessity if the competition were to continue. And water competition was, beyond doubt, especially in view.'

"In the case from 50 Fed. Rep. above cited, this is one of the rubrics: 'Los Angeles, California, is a point to which there is active competition in certain kinds of freight between several transcontinental railway lines, direct or by water, via

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Vancouver and San Francisco; also, by ocean freight via Aspinwall and the straits of Magellan, from points east of the Missouri river. And a through rate on the same kind of freight, lower than to San Bernardino, an intermediate, noncompetitive point, 60 miles from Los Angeles, on one of the competing railroad lines, is not prohibited by the act, since the circumstances and conditions were substantially dissimilar.'

"The circumstances of the case at bar are closely like those of the case just quoted. Charleston is a competitive point between all railroad routes, routes partly by rail and partly by water, and routes all water. If the defendants had not consented with each other to lower the rate, no hay whatever would come from the hay-producing territory tributary to Memphis, and all the southeast Atlantic states would be compelled to rely on other portions of the west, north, or northeast for hay. The evidence clearly shows that the rate to Charleston was forced down by this competition. But this is an advantage to all the territory tributary to Charleston, and all stations share in it. No such competition exists at Summerville, a small inland town. If it, and others like it, were permitted to share in the circumstances and conditions surrounding Charleston, and to get the benefit of the competition which Charleston enjoys, and they have not, then, *ex necessitate*, the South Carolina Railway will be called upon to elect between its through business and its local business, and in this election to give up the former. Thus, all stations on the line of road will pay local freight on hay, and the market, to the extent of imports from Memphis, will be destroyed. The interstate commerce law was intended to promote trade. Such a construction as is now sought would destroy competition, the life of trade."

Subsequently the attention of the circuit court was called to the asserted fact that there had been a service on the defendant, as to whom it was stated, in the opinion of the court, there had been no service of process. In a memoran-

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dum opinion the court in substance said that, conceding, *arguendo*, the correctness of the fact called to its attention, as it would not change the result of the decision it was unnecessary to further consider it.

The circuit court of appeals decided that the circuit court had mistakenly held that one of the parties essential to the cause had not been properly served, and that the circuit court had also fallen into error in deciding that the carriers in question were not, within the intendment of the commerce act, a continuous line for through transportation under a common management and control. When it came to consider the conflicting conclusions of the Commission and the circuit court as to the meaning of the 4th section of the act, the court held that the interpretation adopted by the Commission was right, and that upheld by the circuit court was wrong. In other words, the circuit court of appeals decided that no competition existing at the place of delivery, however far reaching or arising at the initial point from the action of other carriers who were subject to the control of the act, could justify a carrier in making a greater charge for a shorter than for a longer haul, although such competitive conditions might empower the Commission, on application of the carrier, to grant the right to make such charge. The reasons which impelled the circuit court of appeals to the conclusion by it reached are very clearly stated in its opinion, from which a member of the court (MORRIS, District Judge) dissented. The court said (42 U. S. App. 594, 83 Fed. Rep. 905, 28 C. C. A. 236):

"The decisions of the Interstate Commerce Commission concerning the proper construction of § 4 of the Interstate Commerce Act have not been uniformly sustained by the decrees of the courts of the United States in cases instituted for the purpose of enforcing the orders of the Commission concerning that section, and, therefore, prior to the announcement of the opinion of the Supreme Court in the Social Circle Case [Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 4 Am. &

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Eng. R. Cas., N. S., 223, 40 L. Ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700] there was much confusion concerning the true meaning of the same. A careful reading of that opinion impels us to the conclusion that the construction given that section by the Interstate Commerce Commission in a number of cases decided by it prior to such decision is the proper one. In this connection may be cited the following: *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.*, 3 Inters. Com. Rep. 682, 4 I. C. C. Rep. 744; *Trammell v. Clyde S. S. Co.*, 4 Inters. Com. Rep. 120, 5 I. C. C. Rep. 324; *Chattanooga Bd. of Trade v. East Tennessee, V. & G. R. Co.*, 4 Inters. Com. Rep. 213, 5 I. C. C. Rep. 546."

Again:

"We adopt the conclusion heretofore announced by the Interstate Commerce Commission (4 Inters. Com. Rep. 520), which is, in substance, that, in order to justify the greater charge for the shorter distance because of water competition, the transportation as to which such competition exists must be concerning freight to the longer-distance point, which, if not carried to such point by the road giving the rate complained of, could reach that point by water transportation; and also that the competition of one transportation line cannot be said to meet that of another for the carriage of traffic from any particular locality unless one line could perform the service if the other did not. Such we believe to be the true meaning of § 4 so far as the point we are now considering is involved. We are also of opinion that the competition claimed by the appellees to exist between the different markets—particularly those of Memphis, Chicago, and the north Atlantic ports—to supply the trade of Charleston with the products mentioned, is not in reality the competition that affects rates from a particular locality, but is one that is regulated by the commercial circumstances existing at those points, applicable to business of that character and not connected with the usual conditions under which transportation is conducted; nor does such competi-

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tion in our judgment create the dissimilar circumstances and conditions referred to in § 4 of the act now under consideration. And we further hold that competition between carriers subject to the requirements of said act does not produce such substantial dissimilarity in the circumstances and conditions under which transportation is performed as will justify such carriers in making a greater charge for the shorter than for the longer haul without an order to that effect from the Commission granted by it as provided for in the proviso to the fourth section."

Approaching, then, a solution of the questions which arise from the report of the Commission and the decisions below rendered, which substantially also embrace the essential matters covered by the assignments of error and the material issues which were urged in the argument at bar, it appears that the propositions involved are threefold. First. Was it correctly decided that the carriers as the result of the arrangements between them constituted, within the purview of the 1st section of the Act to Regulate Commerce, a continuous line, so far at least as regards the shipments between Memphis, Summerville, and Charleston? Second. Was it correctly held by the Commission and decided by the circuit court of appeals, that under the 4th section of the act no competition, however material, unless it arose from certain enumerated sources or was of the inherent character stated by the Commission and the circuit court of appeals, could create such dissimilarity of circumstance and condition as would authorize the carrier, of his own motion, to charge a greater rate for a lesser than for a longer distance? The provisions of the 4th section which are involved in the second proposition are as follows:

"§ 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction,

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the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided*, however, that, upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

Third. If it be concluded that the Commission and the circuit court of appeals erroneously interpreted the 4th section of the act, is the record in such a condition as to justify this court in deciding, as a question of first impression, whether the through rates complained of were just and reasonable, and whether, if yes, the proof offered by the carrier established such substantial and material competition as would support a charge by the carrier, on his own motion, of a lesser rate for the longer than is exacted for the shorter distance?

The first two of the foregoing questions in effect solely involve propositions of law, for, although the essential predicate upon which they rest takes into consideration certain facts, they were not disputed below, and their existence was not denied in the argument at bar. They may be assumed, therefore, as being unchallenged for the purpose of the legal questions presented. We come, then, to the immediate consideration of the propositions above referred to in the order stated.

1st. The conceded facts from which it was deduced as a matter of law that the carriers were operating "under a common control, management, or arrangement for a continuous carriage or shipment" were as follows:

The several carriers transported hay from Memphis under through bills of lading, by continuous carriage, to Summerville and Charleston. The

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several roads shared in an agreed rate on traffic to Charleston and in a precisely equal in amount rate on traffic to Summerville. On shipments to Summerville, however, there was added to the Charleston rate the amount of the local rate from Charleston to Summerville, the benefit of which additional exaction was solely received by the local road on which Summerville was situated. The contention that under this state of facts the carriers did not constitute a continuous line, bringing them within the control of the Act to Regulate Commerce, is no longer open to controversy in this court. In *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 4 Am. & Eng. R. Cas. N. S., 223, 40 L. Ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700, decided since the case in hand was before the Commission and the circuit court, it was held under a state of fact substantially similar to that here found that the carriers were thereby subject to the Act to Regulate Commerce.

2d. It is, as we have said, uncontroverted that all the competition relied on by the carriers to establish that there was a dissimilarity of circumstance and condition arose solely from two sources: either that originating at Memphis, the initial point of the traffic, from the presence there of carriers who were subject to the provisions of the commerce act, or competition based on the fact that Charleston was connected with or accessible to lines of rail and water communication which brought it in relation with many other places and markets other than Memphis, thereby creating competition between Memphis and Charleston, the claim being that Memphis would have been deprived of the benefits of the Charleston traffic, and Charleston would be also cut off from the Memphis supply, if the rates from Memphis to Charleston had not been made lower to meet the competition at Charleston.

The construction of the 4th section of the Act to Regulate Commerce and the question whether competition which materially operated on traffic and rates was a proper subject to be considered by a carrier in charging a greater rate for the

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shorter than was asked for the longer distance, on account of the dissimilarity of circumstance and condition produced by such competition, has recently, after elaborate argument and great consideration, been passed upon by this court. In *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666, the facts as stated by the court which are pertinent to the legal question now under consideration were briefly as follows (pp. 196-200, L. Ed. pp. 940, 941, Inters. Com. Rep. pp. 406, 407, Sup. Ct. Rep. p. 668): The Interstate Commerce Commission entered an order directing the railway to "forthwith cease and desist from carrying any article of imported traffic shipped from any foreign port through any port of entry of the United States, or any port of entry in a foreign country adjacent to the United States, upon through bills of lading destined to any place within the United States, at any other than upon the inland tariff covering other freight from such port of entry to such place of destination, or at any other than the same rates established in such inland tariff for the carriage of other like kind of freight, in the elements of bulk, weight, value, and expense of carriage." The railway company refused to obey the order, and a proceeding was initiated by complaint filed in the circuit court to compel it to do so. The substance of the answer of the railroad, so far as material to the matter now under review, was thus recited by the court (pp. 205, 206, L. Ed. pp. 942, 943, Inters. Com. Rep. p. 412, Sup. Ct. Rep. 670):

"The answer of the Texas & Pacific Railway Company to the petition of the New York Board of Trade & Transportation before the Interstate Commerce Commission, and the answer of said company to the petition of the Commission filed in the circuit court, allege that rates for the transportation of commodities from Liverpool and London, England, to San Francisco, California, are in effect fixed and controlled by the competition of sailing vessels for the entire distance; by steamships and sailing vessels in connection with railroads

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across the isthmus of Panama; by steamships and sailing vessels from Europe to New Orleans, connecting these under through arrangements with the Southern Pacific Company to San Francisco. That, unless the defendant company charges substantially the rates specified in its answer, it would be prevented, by reason of the competition aforesaid, from engaging in the carrying and transportation of property and import traffic from Liverpool and London to San Francisco, and would lose the revenue derived by it therefrom, which is considerable, and important and valuable to said company. That the rates charged by it are not to the prejudice or disadvantage of New Orleans, and work no injury to that community, because, if said company is prevented from participating in said traffic, such traffic would move via the other routes and lines aforesaid without benefit to New Orleans, but, on the contrary, to its disadvantage. That the foreign or import traffic is upon orders by persons, firms, and corporations in San Francisco and vicinity buying direct of first hands in London, Liverpool, and other European markets; and if the order of the Commission should be carried into effect it would not result in discontinuance of that practice or in inducing them to buy in New Orleans in any event. That the result of the order would be to injuriously affect the defendant company in the carriage of articles of foreign imports to Memphis, St. Louis, Kansas City, and other Missouri river points."

After stating that the foregoing facts were fully established by the proof and in effect conceded, and after remarking (p. 207, L. Ed. p. 943, Inters. Com. Rep. p. 413, Sup. Ct. Rep. p. 670) that they "would seem to constitute 'circumstances and conditions' worthy of consideration, when carriers are charged with being guilty of unjust discrimination or of giving unreasonable and undue preference or advantage to any person or locality," the court observed (p. 217, L. Ed. p. 947, Inters. Com. Rep. pp. 422, 423, Sup. Ct. Rep. p. 674):

"The Commission justified its action wholly upon the con-

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struction put by it on the Act to Regulate Commerce, as forbidding the Commission to consider the 'circumstances and conditions' attendant upon the foreign traffic as such 'circumstances and conditions' as they are directed in the act to consider. The Commission thought it was constrained by the act to regard foreign and domestic traffic as like kinds of traffic under substantially similar circumstances and conditions, and that the action of the defendant company in procuring through traffic that would, except for the through rates, not reach the port of New Orleans, and in taking its *pro rata* share of such rates, was an act of 'unjust discrimination,' within the meaning of the act.

"In so construing the act we think the Commission erred."

Later, in recurring to the subject of competition as creating dissimilarity of circumstance and condition, the court said (p. 233, L. Ed. p. 952, Inters. Com. Rep. p. 437, Sup. Ct. Rep. pp. 680, 681):

"That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered.

In *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. Rep. 45, the controversy was this: A proceeding was commenced to compel a carrier to obey an order of the Commission forbidding the charge of a lesser rate for transportation to Montgomery, the longer distance, than was charged to Troy on the same line, the shorter distance. The nature of the competition relied on by the carriers is fully shown by a statement in the opinion, referring to one of the assignments

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of error made in the cause. The court said (*Id.* p. 162, L. Ed. p. 421, Sup. Ct. Rep. p. 47) :

"Errors are likewise assigned to the action of the court in having failed and refused to affirm and enforce the report and opinion of the Commission, wherein it was found and decided, among other things, that the defendants, common carriers which participate in the transportation of class goods to Troy from Louisville, St. Louis, and Cincinnati, and from New York, Baltimore, and other northeastern points, and the defendants, common carriers which participate in the transportation of phosphate rock from South Carolina and Florida to Troy, and the defendants, common carriers which participate in the transportation of cotton from Troy to the ports of New Orleans, Brunswick, Savannah, Charleston, West Point, or Norfolk, as local shipments or for export, have made greater charges, under substantially similar circumstances and conditions, for the shorter distance to or from Troy than for longer distances over the same lines in the same direction, and have unjustly discriminated in rates against Troy, and subjected said place and dealers and shippers therein to undue and unreasonable prejudice and disadvantage in favor of Montgomery, Rufaula, Columbus, and other places and localities and dealers and shippers therein, in violation of the provisions of the Act to Regulate Commerce."

It will thus be observed that the facts presented were, in legal effect, the equivalent of those arising on this record. The competition which the carrier asserted had created such dissimilarity of circumstance and condition as justified, on its own motion, the lesser charge for the longer than was made for the shorter distance, was competition not only arising by water transportation, but alleged to spring from common carriers who were confessedly subject to the control of the Act to Regulate Commerce. The error which it was asserted the record contained was that such competition had been held, by the lower courts, sufficient to create dissimilar circumstances and conditions, and that the right of the car-

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rier to avail himself of such dissimilarity without the previous assent of the Commission had been also sustained. This court said (pp. 162, 163, L. Ed. p. 421, Sup. Ct. Rep. p. 47):

“Whether competition between lines of transportation to Montgomery, Eufaula, and Columbus justifies the giving to those cities a preference or advantage in rates over Troy, and, if so, whether such a state of facts justifies a departure from equality of rates without authority from the Interstate Commerce Commission under the proviso of the 4th section of the act, are questions of construction of the statute, and are to be determined before we reach the question of fact in this case.”

Proceeding to the question of law, the construction of the fourth section, which was involved in supporting the interpretation of the Commission, it was stated, as follows: “It is contended in the brief filed on behalf of the Interstate Commerce Commission that the existence of rival lines of transportation, and consequently, of competition for the traffic, are not facts to be considered . . . when determining whether property transported over the same line is carried ‘under substantially similiar circumstances and conditions’ as that phrase is found in the 4th section of the act.” The court then examined this question, and after citing from an opinion of JUDGE COOLEY in the matter of *Re Southern R. & S. S. Asso.*, 1 Inters. Com. Rep. 278, 287, *sub nom*; *Re Louisville & N. R. Co.*, 1 I. C. C. Rep. 31, 78, said (p. 164, L. Ed. p. 422, Sup. Ct. Rep. p. 48):

“That competition is one of the most obvious and effective circumstances that make the conditions, under which a long and short haul is performed, substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the Act to Regulate Commerce, has been held by many of the circuit courts. It is sufficient to cite a few of the number: *Ex parte Koehler*, 31 Fed. Rep. 315, 1 Inters. Com. Rep. 317; *Missouri P. R. Co. v. Texas & P. R. Co.*, 31 Fed. Rep. 862, 4 Inter. Com.

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Rep. 434; Interstate Commerce Commission v. Atchison, T. & S. F. R. Co., 50 Fed. Rep. 295, 4 Inters. Com. Rep. 323; Interstate Commerce Commission v. Cincinnati, N. A. & T. P. R. Co., 56 Fed. Rep. 925, 943, 4 Inters. Com. Rep. 332; Behlmer v. Louisville & N. R. Co., 71 Fed. Rep. 835, 9 Am. & Eng. R. Cas., N. S., 620; Interstate Commerce Commission v. Louisville & N. R. Co., 73 Fed. Rep. 409."

It is to be remarked that among the cases approvingly cited in the passage just quoted will be found the opinion of the circuit court in the very case now before us, which opinion was opposed to the construction of the law taken by the Commission and to that announced by the circuit court of appeals in this cause. Referring to the claim that under a correct interpretation of the proviso of the 4th section carriers were not allowed to avail themselves of dissimilar circumstances and conditions, arising from competition, without the previous assent of the Commission, the court again cited from an opinion of the Interstate Commerce Commission delivered by JUDGE COOLEY, as follows (pp. 168, 169, L. Ed. pp. 423, 424, Sup. Ct. Rep. pp. 49, 50):

"That which the act does not declare unlawful must remain lawful if it was so before, and that which it fails to forbid the carrier is left at liberty to do, without permission of anyone. . . . The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and, therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since, if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated. . . . Beyond question, the carrier must judge for itself what are the 'substantially similar circumstances and conditions' which preclude the special rate, rebate, or drawback, which is made unlawful by the 2d section, since no tribunal is empowered to judge for it until after the carrier has acted, and

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then only for the purpose of determining whether its action constitutes a violation of law. The carrier judges on peril of the consequences; but the special rate, rebate, or drawback which it grants is not illegal when it turns out that the circumstances and conditions were not such as to forbid it; and as Congress clearly intended this, it must also, when using the same words in the 4th section, have intended that the carrier, whose privilege was in the same way limited by them, should in the same way act upon its judgment of the limiting circumstances and conditions."

And the approval of the construction given to the act in the passage from the opinion of JUDGE COOLEY was not left to implication, since the court added (p. 169, L. Ed. p. 424, Sup. Ct. Rep. p. 50):

"The view thus expressed has been adopted in several of the circuit courts (*Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 50 Fed. Rep. 295, 300, 4 Inters. Com. Rep. 323; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 56 Fed. Rep. 925, 943, 4 Inters. Com. Rep. 332; *Behlmer v. Louisville & N. R. Co.*, 9 Am. & Eng. R. Cas., N. S., 620, 71 Fed. Rep. 835, 839); and we do not think the courts below erred in following it in the present case. We are unable to suppose that Congress intended, by the 4th section and the proviso thereto, to forbid common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the Commission shall authorize them so to do."

It is then settled that the construction given in this cause by the Interstate Commerce Commission and the circuit court of appeals to the 4th section of the Act to Regulate Commerce was erroneous, and hence that both the Interstate Commerce Commission and the circuit court of appeals mistakenly considered, as a matter of law, that competition, however material, arising from carriers who

Same—Dissimilarity of Circumstances and Conditions—Absence of Previous Assent of Commission.

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were subject to the Act to Regulate Commerce could not be taken into consideration, and likewise that all competition, however substantial, not originating at the initial point of the traffic, was equally, as a matter of law, excluded from view. It follows that the decree of the circuit court must be reversed unless it be the duty of this court to examine the evidence, which was not passed on by the Commission or the circuit court of appeals, for the purpose of ascertaining whether the competition relied on was so substantial and so controlling on traffic and rates as to cause it to produce a dissimilarity of circumstance and condition within the meaning of the 4th section of the act. A consideration of this subject leads to a solution of the third question which we have previously stated was involved in the cause. In passing, however, it is well to say that both the opinions of this court, just referred to, were announced subsequently to the decision in this case by the Interstate Commerce Commission and of the circuit court, and moreover that the opinion of this court in the last cause (the Midland Case) was announced after the decision of the circuit court of appeals of the case now here. Indeed, since the decision last referred to, it is not denied that the Interstate Commerce Commission have recognized that the interpretation previously given by it to the 4th section had been decided to be unsound, hence in the practical application of the law, since the decision by this court in the Midland Case, the construction of the statute which was announced by the Commission in previous cases as well as in this has no longer been applied. 11 Ann. Rep. I. C. C. (1897), pp. 38, 43, 91; *Savannah Bureau of Freight & Transportation v. Charleston & S. R. Co.*, 7 Inters. Com. Rep. 479, 480.

Before determining the final question we notice certain contentions pressed in argument, whereby it is asserted that there is such a difference between the legal issues here arising and those which were presented in the cases referred to that this case should not be con-

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trolled by them. In any event, it is argued, the action of the Commission and the circuit court of appeals in this controversy was of such a nature as to render the previous rulings of this court inapposite, and hence it is unnecessary to apply them. Whilst it is not denied as regards competition arising from other carriers at the place of origin of the traffic, who were subject to the control of the Act to Regulate Commerce, that the decision here under review is not in accord with the rulings of this court, such it is claimed is not the case as to competition not originating at the initial point of carriage. From this premise it is argued that it was correctly decided below that substantial and material competition resulting from conditions existing at the point of delivery, such as accessibility of that place to other lines of transportation from other places by rail or water, or both, was, as a matter of law, correctly decided below to be without legal efficacy in producing dissimilarity of circumstances and conditions. In this regard, then, the decree below, it is insisted, was correct. But the facts which were presented in the records passed on by this court, in the cases to which we have referred, do not justify the premise from which this presumed difference is deduced. We do not stop, however, to analyze those facts, because, granting, *arguendo*, the assumption upon which the suggested distinction is based, we think it is without merit. What was decided in the previous cases was that under the 4th section of the act substantial competition which materially affected transportation and rates might, under the statute, be competent to produce dissimilarity of circumstances and conditions, to be taken into consideration by the carrier in charging a greater sum for a lesser than for a longer haul. The meaning of the law was not decided to be that one kind of competition could be considered and not another kind, but that all competition, provided it possessed the attributes of producing a substantial and material effect upon traffic and rate making, was proper under the statute to be taken into consideration. Indeed, if the distinction contended for were sound it would

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proof did not result to show that it was so substantial and so material as to justify deciding that there were dissimilar circumstances and conditions. The judgment below was, because of this view as to such question, affirmed. The court said (p. 194, L. Ed. p. 938, Inters. Com. Rep. p. 401, Sup. Ct. Rep. p. 704): "But the question was one of fact peculiarly within the province of the Commission whose conclusions have been accepted and approved by the circuit court of appeals, and we find nothing in the record to make it our duty to draw a different conclusion." If it be again, *arguendo*, conceded the state of the record in that case was such that an analysis of the action taken below might have well led the court to a different opinion; in other words, might have justified it in holding that both the Commission and the circuit court of appeals had rested their conclusions, not on the want of proof as to the claimed competition, but solely on the absence of legal power to assert competition of the character relied on, such concession could have no influence upon the decision of this cause. This follows because the only deduction possible from the proposition would be that the particular case had been decided on a question of fact, when it should have been controlled by a question of law, which would afford no reason for the failure to apply sound principles of law to the facts of this record. It involves a complete *non sequitur* to assert that because legal principles may not have been applied to a given case, on the assumption that the facts did not render their application necessary, therefore, in future cases, where it was found that the facts brought the controversy within the principles, they should not be applied.

It remains only to examine the last question—that is, whether this court, as a matter of first impression, should weigh the evidence for the purpose of ascertaining whether it established such substantial and material competition as justified the carrier in concluding that dissimilarity of circumstance and condition was brought about. If it were true, as as-

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served in the argument for the appellee, that where the inherent character of the competition was of a nature to be taken into consideration, any competition, however remote and unsubstantial its influence on rates and traffic, would be sufficient to bring about dissimilarity of circumstances and conditions, the question would be easy of solution, for then to weigh the testimony would involve no serious duty. But this suggestion rests on an entire misconception of the adjudications of this court. In considering the right of a carrier to act on competitive conditions, deemed by him to produce dissimilarity of circumstances and conditions, the court, in *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 173, 42 L. Ed. 425, 18 Sup. Ct. Rep. 51, said :

"But it does not mean that the action of the carriers, in fixing and adjusting the rates, in such instances, is not subject to revision by the Commission and the courts, when it is charged that such action has resulted in rates unjust or unreasonable, or in unjust discriminations and preferences."

Again (p. 167, L. Ed. p. 423, Sup. Ct. Rep. p. 49), it was said :

"In order further to guard against any misapprehension of the scope of our decision it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the 3d and 4th sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of 'undue or unreasonable preference or advantage,' or what are 'substantially similar circumstances and conditions.' The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration."

It follows that whilst the carrier may take into consideration

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the existence of competition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles: First. The absolute command of the statute that all rates shall be just and reasonable, and that no undue discrimination be brought about, though, in the nature of things, this latter consideration may in many cases be involved in the determination of whether competition was such as created a substantial dissimilarity of condition. Second. That the competition relied upon be, not artificial or merely conjectural, but material and substantial, thereby operating on the question of traffic and rate making, the right in every event to be only enjoyed with a due regard to the interest of the public, after giving full weight to the benefits to be conferred on the place from whence the traffic moved as well as those to be derived by the locality to which it is to be delivered. If, then, we were to undertake the duty of weighing the evidence in this record, we would be called upon, as a matter of original action, to investigate all these serious considerations which were shut out from view by the Commission, and were not weighed by the circuit court of appeals, because both the Commission and the court erroneously construed the statute. But the law attributes *prima facie* effect to the findings of fact made by the Commission, and that body, from the nature of its organization and the duties imposed upon it by the statute, is peculiarly competent to pass upon questions of fact of the character here arising. In *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666, the court found the fact to be that the Commission had failed to consider and give weight to the proof in the record, affecting the question before it, on a mistaken view taken by it of the law, and that on review of the action of the Commission the circuit court of appeals, whilst considering that the legal conclusion of the Commission was wrong, nevertheless proceeded as a matter of original investigation to weigh the testimony and determine the facts flowing from it. The court

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said (p. 238, L. Ed. p. 954, Inters. Com. Rep. p. 441, Sup. Ct. Rep. p. 682):

"If the circuit court of appeals was of opinion that the Commission in making its order had misconceived the extent of its powers, and if the circuit court had erréd in affirming the validity of an order made under such misconception, the duty of the circuit court of appeals was to reverse the decree, set aside the order, and remand the cause to the Commission, in order that it might, if it saw fit, proceed therein according to law. The defendant was entitled to have its defense considered, in the first instance at least, by the Commission, upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded. The questions whether certain charges were reasonable or otherwise, whether discriminations were due or undue, were questions of fact to be passed upon by the Commission in the light of all facts duly alleged and supported by competent evidence, and it did not comport with the true scheme of the statute that the circuit court of appeals should undertake, of its own motion, to find and pass upon such questions of fact, in a case in the position in which the present one was."

We think these views should be applied in the case now under review. In this case, however, the proceeding to enforce the order of the Commission was initiated by a private individual on behalf of himself and other interested parties not named, and the petitioner in the circuit court has died since the argument and submission of the cause in this court. We are of opinion, therefore, that the *decree* of the Circuit Court of Appeals should be *reversed* with costs, that the case be remanded to the Circuit Court with instructions to modify its decree adjudging that the order of the Commission be set aside with costs, by providing that the dismissal be without prejudice to the right of a party in interest to apply to the Commission to be substituted in the original proceeding before the Commission in the stead of the deceased petitioner, and that upon such substitution the Commission should proceed upon the evidence already introduced

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before it or upon such evidence and any additional evidence which it might allow to be introduced, to hear and determine the matter of controversy in conformity to law. A decree will be entered accordingly, such entry to be made *nunc pro tunc* as of the date of the submission of the cause in this court.

Fox

v.

PENNSYLVANIA R. CO.

(*Supreme Court of Pennsylvania, April 30, 1900.*)

Accident at Crossing over Private Siding—Contributory Negligence as Matter of Law.*—In any case where a person on a highway approaches a railroad crossing, and the evidence shows that by the vigilant exercise of his senses of sight and hearing an approaching train or cars could have been observed or discovered in time to avoid a collision, and a collision takes place at the moment he steps or goes upon the track, there can be no recovery for his injury against the railroad, and it is the duty of the court to so hold, regardless of testimony as to his having stopped, looked, and listened; and the fact that the crossing is over a private siding cannot be material in this connection.

Whether Negligence to Shunt Detached Cars onto Siding.—It is not negligence *per se* to shunt cars in on a siding, detached from the engine.

APPEAL by plaintiff from Center county court of common pleas. *Affirmed.*

The opinion of the court below reads as follows: "This was an action of trespass, brought by Mrs. Mary T. Fox against the Pennsylvania Railroad Company to recover damages for the death of her husband, who died from injuries received at a public crossing on Race street, in the borough of Bellefonte, on the 13th of November, 1897. At the close of the plaintiff's testimony

Case Stated.

*See notes at end of case.

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the defendant moved for a compulsory nonsuit, which was granted, with leave to show cause why the same should not be stricken off. This cause came on and was argued upon the rule to show cause why the nonsuit should not be taken off. The facts, as shown by the plaintiff's evidence, were about as follows: Joseph Fox, the deceased, on the morning of November 13, 1897, about 11 o'clock a. m., was standing on the pavement at the corner of High and Race streets in the borough of Bellefonte, talking with Amos Mullen. The position he was then occupying was not more than about fifty feet distant from the defendant company's siding that was being used at the time in shifting cars. The deceased left the corner, and walked down Race street on the Bush House side of the same, at an apparently natural gait, to where the Lehigh Valley siding crosses the said street before entering the coal yard, now under lease to the Bellefonte Fuel & Supply Company. The distance to the said crossing from High street is about one hundred and seventy-seven feet. The defendant company was shifting a couple of cars loaded with coal from its main siding over the Lehigh Valley siding into the coal yard. The defendant company, with the two coal cars attached ahead of the locomotive, came down the main siding to about the center of High street crossing, and then cut loose from the cars, and shunted them over the Lehigh Valley siding; the Lehigh Valley siding connecting with the defendant company's siding a few feet below High street. There was a brakeman in charge of the two cars. Just as the two cars got to the eastern side of Race street at the crossing, the deceased was struck by them, just as he was about to step on the track, and his right foot cut off, and right leg and thigh crushed, from the effects of which injury he died in a few minutes. The distance from the center of High Street Bridge, by the siding, to where the accident occurred, is about two hundred feet. One of the plaintiff's witnesses (E. Schofield) testifies that the cars were shoved in at a rapid rate; another (Earl Tuten) testifies that they

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were going fast. Both testify they do not know whether they were going as fast as a man could run or not. They both testify they heard no whistle or bell rung. Tuten was several hundred feet down the track. Wm. Hogarth, who has a boiler repair shop just on opposite side of main tracks of the defendant, about fifty of sixty feet from the siding, testifies that there was nothing unusual about the shifting of the cars, and that they were run in at rate of about five miles an hour, and that the sidings were in use daily. Curt Johnson testified that he was, with his team, standing on High Street Bridge, right in front of the engine and cars, and waited until the engine cut loose from the cars and reversed, and moved back up the track, when he drove over; that the engine bell was rung, and that there was nothing unusual about the shunting the cars in on the siding. The brakeman had the cars under control, as he was able to place them in the yard on the trestle, where desired. The evidence shows beyond question that a foot passenger, when within twenty feet of the crossing, by glancing up the siding could see the cars at the High Street Bridge, a distance of almost two hundred feet up the track, without any obstruction to the view. Race street is a public thoroughfare, and leads to the coal yard, lumber yard, and some mills. The deceased was familiar with the street and the crossing, and had been for years. There were no gates at this railroad crossing, and never had been, although it had been in use for at least thirty years or more. The siding is a private siding for the use of the coal yard and shed. It is but a single track, and the siding is open from the main siding of defendant company for a distance of some fifteen feet beyond the crossing on Race street, at which point it is fenced, and inclosed within the coal yard. L. C. Green, a witness for plaintiff, testified he saw deceased walk by his shop on Race street, and bid him the time of day; and that he saw him stop, just beyond the alley leading to Cox's livery stable, which would be perhaps twenty feet or more from the crossing, and glance up the track, and that he started on. He went into his shop,

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and did not see him again until after the accident had occurred. That he did not see the cars, and that they were behind Keichline's shop, a building covering part of the race south of the siding. The accident occurred about 11 o'clock a. m., November 13, 1897, in broad daylight. The plaintiff was struck either when close to the track, or just as he was about to step on the track to cross a single track. When within a few feet of the track, by the proper exercise of his sight and hearing, he could have seen the approaching cars for a distance of about two hundred feet, without any obstruction to his vision. The siding is also on a slight curve, and the running of the cars could have been heard for some distance. There was no one else on the street near the crossing; and by the proper use of his senses, such as an ordinary man should make under the circumstances, the collision on his part could have and should have been avoided. He was familiar with the street and crossing, and the ordinary daily use of siding, and had been for years. We think that the case clearly comes within the rule, as well established by abundance of authority, of contributory negligence on the part of the deceased, and that the defendant is not, therefore, liable. The general rule as to passengers on a highway approaching a railroad crossing is well laid down by Pierce, R. R. p. 343. He says: 'A traveler upon a highway, when approaching a railroad crossing, ought to make a vigilant use of his senses of sight and hearing in order to avoid a collision. This precaution is dictated by common prudence. He should listen for signals, and look in the different directions from which a train may come. If, by neglect of this duty, he suffers injury from a passing train, he cannot recover from the company, although it may itself be chargeable with negligence, or have failed to give the signals required by statute, or be running at the time at a speed exceeding the legal rate.' Growing out of the general rule as just stated, the supreme court of this state, in the case of *Holden v. Railroad Co.*, 169 Pa. St. 1, 32 Atl. 103, held that 'when a collision takes place at the moment

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when a person, either on foot or in a carriage, goes upon a railroad track, he cannot recover, no matter what the testimony be as to stopping, looking, and listening, because the fact of the immediate collision conclusively proves that he did not exercise his senses as to the approaching train.' The same principle has been well settled in a long line of cases, which it is unnecessary to cite. It, however, may be considered as a well-settled principle of law that in any case

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where a person on a highway approaches a railroad crossing, and the evidence shows that by the vigilant exercise of his senses of sight and hearing an approaching train or cars could have been observed or discovered in time to avoid a collision, and a collision takes place at the moment he steps or goes upon the track, he is, as a matter of law, guilty of contributory negligence, and cannot recover against the company, and it is the duty of the court to so hold, regardless of the testimony as to his having stopped, looked, and listened. It was contended by the plaintiff that, because this was a private siding that the public highway crossed, the rule as to the duty of the passenger was more relaxed; that he was not bound to stop, look, and listen; and in support of that supposition cited *Ash v. Railroad Co.*, 148 Pa. St. 133, 23 Atl. 898. A careful examination of the case, however, does not relax the rule of care required when a person is about to cross a railroad track, nor does it modify the rule as to the necessity of stopping, looking, and listening. In that case *Ash* was an employee in the planing mill. He knew of the daily use of the siding, and a couple of empty cars were standing on the siding. Just as he was about to cross the track with a piece of scantling on his shoulder, in front of the standing cars, the engine was in the act of shunting another empty car in onto the track where the two were standing, for the purpose of coupling to them to take them out, and the car that was shunted in started the others just as he stepped onto the track, and caught him; the accident causing

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his death. JUSTICE WILLIAMS, in his opinion, on pages 137, 138, 148 Pa. St., and page 899, 23 Atl., says: 'But he knew the fact that the siding was across his path, that two cars were upon it, that they were to be taken away at some time that day, and he owed it to himself to see whether the work of removal was in actual progress before putting himself upon the track. If he had taken the trouble to look, he would have seen the car approaching that the engine had just thrown in on the siding, and, by waiting for an instant, until the cars were removed, could have crossed the track in safety. Because he did not look, he put himself in the way of the cars just in time to lose his life.' Under the facts as appeared in that case the supreme court held as matter of law that Ash was guilty of contributory negligence, and reversed the judgment of the court below, without awarding a new *venire*. We think the facts of the case at bar clearly bring it within the principles of law above cited. The deceased knew, or should have known, the siding was being used. This he could have observed while standing at the corner of High and Race streets, a few minutes before the accident occurred, while the shifting was in progress. He walked down Race street about one hundred and seventy-seven feet, and when within a few feet of the track he had an unobstructed view of the track for about two hundred feet. A glance would have warned him of the approaching cars that were coming at a speed of about five or six miles an hour, yet he walked on, and was struck by the cars just as he was about to step on the track, and lost his life. Surely, under the well-settled principles of law, he was guilty of contributory negligence, and there can be no recovery against the company. We think the evidence failed to show negligence upon the part of the defendant company. The weight of the plaintiff's evidence clearly showed that when the cars were being shunted in on the siding the engine bell was being rung, and that the cars were not shunted in at an unusual rate of speed, but in the ordinary manner; that they were in control of a brakeman,

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who landed them where wanted in the yard. Now, unless it is negligence to shunt cars in on a siding, detached from the engine, then there was really no evidence of negligence upon the part of the defendant shown. We know of no law or principle that holds that a railroad company has no right to shift cars onto a siding by shunting them in detached from the engine. We are therefore of the opinion that the nonsuit was properly granted, and should not be taken off."

Whether Negligence to Shunt Detached Cars onto Siding.

James Scarlet and Jno. M. Dale, for appellant.

John Blanchard, for appellee.

PER CURIAM. The judgment in this case is affirmed on the opinion of the learned court below, refusing to take off the nonsuit.

NOTES.

Accident at Crossing—Presumption of Negligence.—See *Louisville & N. R. Co. v. Clark's Adm'r* (Ky.), 12 Am. & Eng. R. Cas., N. S., 407, and extensive *note*, 414 *et seq.*

Failure to "Stop, Look, and Listen" at Railroad Crossing, Whether Negligence Per Se.—See *Ritzman v. Philadelphia & R. R. Co.* (Pa.), 12 Am. & Eng. R. Cas., N. S., 444, and extensive *note*, 444 *et seq.*

Accident at Crossing—Plaintiff's Evidence of Due Care Rebutted by Circumstances of Case.—See *Northern Cent. Ry. Co. v. Medairy* (Md.), 7 Am. & Eng. R. Cas., N. S., 526, and *note*, 532 *et seq.*

Care Required in Backing Cars at Crossing.—See generally 12 Am. & Eng. R. Cas., N. S., 372 *et seq.*

ST. LOUIS S. W. RY. CO. OF TEXAS

v.

CHAMBLISS.

(*Supreme Court of Texas*, Nov. 2, 1899.)

Injuries to Live Stock—Damages—Interest.*—The right of recovery by the owner of stock killed by a railroad train, as defined by

*See *Western & A. R. Co. v. Calhoun* (Ga.), 11 Am. & Eng. R. Cas., N. S., 334, and *notes*, p. 336.

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art. 4528, Rev. St. 1895 of Texas, does not include interest on the value of such stock from the date of the killing to the date of the trial.

QUESTIONS certified by Fifth supreme judicial district court of civil appeals.

Frost, Neblett & Blanding (S. H. West, of counsel), for appellant.

WILLIAMS, J. The court of civil appeals for the Fifth district has certified for decision two questions, which are, in substance, (1) whether or not the right of recovery by the owner of stock killed or so injured as to totally destroy its value, as defined by article 4528, Rev. St. 1895, includes the right to interest on the value of such stock from the date of its destruction to the date of trial; and, if so, (2) is the trial court authorized to peremptorily instruct the jury to allow such interest?

This provision of the statute was adopted in 1860 (Pasch. Dig. art. 4926), was carried into the Revision of 1879, and again into that of 1895. In 1881, in the case of *Railroad Co. v. Muldrow*, 54 Tex. 233, it received construction by this court upon the point now raised, and it was held that the measure of damages prescribed by the language of the statute was the value of the stock killed or injured, and that this excluded interest upon such value. The court of appeals, as formerly existing, whose jurisdiction included most of the appeals in cases arising under this law, seems to have enforced the rule thus established. *Railroad Co. v. Lanham*, 1 White & W. Civ. Cas. Ct. App. § 252; *Railway Co. v. Carter* (Tex. Civ. App.), 18 S. W. 196. While some difference of opinion has arisen among the courts of civil appeals upon the question, the construction given in *Railroad Co. v. Muldrow* has not been overruled or questioned by any court of last resort, nor has the legislature, since that construction was announced, made any change in the law. While we would have considerable difficulty, if the question were now presented for the first time, in adopting the view

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expressed in the Muldrow Case, yet, in view of the facts just stated, we do not feel that we would be warranted in overruling that decision, based, as it is, upon language in a statute as to the effect of which minds may well differ. No good reason is perceived why the owner of stock thus destroyed should not have the same right that owners of property destroyed or taken by the wrongful act of another generally have, under the decisions of this court, to recover, not only its value, but damages commensurate with interest for the detention of the money. But, as the statute as heretofore construed fixes a different rule, we think that the remedy should come from the legislature. The question was not involved in *Railway Co. v. Cocke*, 64 Tex. 151, and that decision does not conflict, so far as the report shows, with the decision in *Railroad Co. v. Muldrow*. We therefore answer that interest in the case stated is not recoverable. It follows that the trial court could not properly instruct the jury to allow interest.

GEORGIA S. & F. RY. CO.

v.

SANDERS.

(Supreme Court of Georgia, June 8, 1900.)

Killing of Stock by Train—Presumption of Negligence—Rebuttal.*
—When it is shown by a plaintiff, in an action against a railroad company to recover damages for killing a cow, that the animal was killed by the running and operation of a train of cars, the law raises a presumption of negligence against the company, and, without more, the plaintiff is entitled to recover the value of the animal killed. Such presumption, however, may be rebutted; and when the evidence of the engineer and fireman on the locomotive which struck the animal is to the effect that she came upon the track suddenly, and immediately in front of the locomotive, and that all

*See *Cantrell v. Kansas City, etc., R. Co. (Miss.)*, 14 Am. & Eng. R. Cas., N. S., 30.

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reasonable and ordinary diligence was used to prevent striking the animal, but without avail, such presumption is successfully rebutted; and, when there is no evidence disproving or tending to disprove this evidence of the train men, the owner is not entitled to recover.

(Syllabus by the Court.)

ERROR by defendant from Lowndes county superior court.
Reversed.

John I. Hall and *J. G. Crawford*, for plaintiff in error.

A. T. Woodward and *Edward R. Austin*, for defendant in error.

LITTLE, J. If there is any one question settled by general law and the interpretation by this court of our statutes, it is, we think, that of the liability of a railroad company to respond in damages to the owner for the killing of live stock by the running and operation of the engines and cars of a railroad company. There are duties owing by the railroad company to the owners of stock, and by such owners to the railroad company. The latter is entitled to the free and unobstructed use of its track, while the owner is entitled to have redress for the willful or negligent killing or injury to his stock, and, while the owner may not be compelled to keep his stock so that they will not trespass on the railroad track, so a railroad company, in an effort to prevent the injury or killing of stock which has wandered on the track, cannot be held liable for such killing or injury when it has been guilty of no negligence, but in good faith has endeavored to prevent such injury or killing. When stock has been injured or killed by the running of a locomotive or train of cars, and such fact is shown, the law presumes that the company was guilty of negligence in injuring or killing such stock, and, if nothing more appears by the evidence, the owner, resting on such presumption, is entitled to recover. This presumption, however, is subject to be rebutted, and when rebutted, and there is no conflict in the evidence, the owner is not entitled to recover. *Railroad Co. v. Wall*, 80 Ga. 202, 7 S. E. 639.

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In the present case it was clearly shown on the part of the plaintiff that a cow of the value of \$50 belonging to him was killed by the running and operation of a train of cars of the plaintiff in error in the county of Lowndes. When these facts were shown the plaintiff rested his case, and in rebuttal the engineer and fireman on the train which struck and killed the cow were examined as witnesses for the defendant. It appears from the testimony of these witnesses that the cow suddenly came upon the railroad track in front of the engine; that these employees were on the lookout, and could not discover this particular cow until she made her appearance on the track, and that then the engineer used all ordinary and reasonable diligence by putting on the brakes and otherwise attempting to prevent striking the cow, but that the distance between where she came on the track and the engine was so short that the train could not be stopped, and so she was struck and killed. This evidence fully rebutted the presumption of negligence which the law raised in this case against the company. No other testimony was offered by the plaintiff, according to the record, and, under the well-known rules of law cited above, the plaintiff was not entitled to recover. Had there been a conflict of evidence on the question as to whether there was negligence on the part of the employees of the company in striking and killing the animal, all parties would have been compelled to yield to the determination of the question of negligence made by the court or jury trying the case. But, as there was no conflict of evidence on the question of negligence, it must be ruled that, as the presumption was overcome by the evidence of the witnesses for the defendant, no right to recover rested in the owner of the cow. *Railroad Co. v. Walker*, 87 Ga. 204, 13 S. E. 511. The court, therefore, committed error in overruling the *certiorari*, and the judgment is reversed. All the justices concurring, except FISH, J., absent on account of sickness.

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SOUTHERN RY. CO.

v.

WATSON.

(*Supreme Court of Georgia, June 5, 1900.*)

Carriers—Right to Limit Liability—Statute.—While the section of the Code which denies to a carrier the right to limit his legal liability by a notice or entry on receipts given or tickets sold, but declares that he may do so by express contract, applies only to carriers of goods, yet, under general law, a carrier of passengers cannot limit his legal liability for the consequences of his own negligence by such notice, or even by express contract.

Carriers of Passengers—Expiration of Tickets—Reasonable Regulations—Ejection.*—A carrier of passengers, however, has the legal right to make reasonable rules and regulations for the conduct of its business in the transportation of passengers. When a regulation is made affixing a limit to the time in which a ticket shall be good, and the time of the limit affords to the passenger ample opportunity to make his journey with safety and convenience to himself, such a regulation, if otherwise reasonable, becomes a part of the contract of carriage, and if, after the expiration of the limit of time specified on his ticket, the passenger tenders the same for his transportation, and for refusing to pay fare is ejected from the train in a decorous and proper manner by the conductor, such ejection affords no cause of action against the carrier.

Same—Same—Same.—A regulation so limiting the period of transportation, when it embraces a provision for refunding the purchase price of the ticket, or any unused part thereof, if not used within the limited period, is, as a matter of law, held to be reasonable. (Syllabus by the Court.)

ERROR by defendant from Griffin city court *Reversed.*

Charlton E. Battle, for plaintiff in error.

Robt. T. Daniel, W. H. Beck, and G. R. Hutchens, for defendant in error.

*See *Trezona v. Chicago G. W. Ry. Co.* (Iowa), 12 Am. & Eng. R. Cas., N. S., 104 and *foot-note*.

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LITTLE, J. Watson instituted an action against the Southern Railway Company to recover damages for being wrongfully ejected from one of the cars of the defendant, while a passenger, on June 1, 1897. A trial of the case resulted in a verdict for the plaintiff for \$200. Defendant made a motion for a new trial, which was overruled, and he excepted. It appeared from the evidence that the plaintiff lived at Tallapoosa, Ga., which was situated on one of the lines of the defendant's railroad. He desired to go to Columbus, Ga., to which point the defendant also maintained and operated a railroad. Plaintiff consulted the agent of the defendant in Tallapoosa, and informed him that he desired to be in Columbus by 10 o'clock on the next day, and was informed by the agent that there was no train running directly from Tallapoosa to Columbus, but that he could go to Atlanta from Tallapoosa on Friday night, and, leaving Atlanta on the early morning train, would arrive in Columbus by 9 o'clock. The agent also told plaintiff that he could purchase a through ticket from Tallapoosa to Columbus, for which there would be no reduction in the rate, but would save him the trouble of purchasing another ticket in Atlanta. The agent said nothing to the plaintiff as to the kind or character of the ticket which he would furnish him. After this conversation, plaintiff purchased a through ticket from Tallapoosa to Columbus, and, leaving Tallapoosa at 8:30 o'clock on Friday night, he reached Atlanta about 11 o'clock the same night. The train for Columbus regularly left Atlanta about 5 o'clock in the morning. Plaintiff went to the station next morning at a very early hour, but did not take the train, because, having temporarily left the station, when he returned the train had departed. There was also a train which left Atlanta daily in the afternoon, reaching Columbus early at night. The route to Columbus from Atlanta by the Southern Railway was over its main line to McDonough, and from there over the Georgia Midland Division to Columbus. The cars for Columbus were attached to a train, and carried to

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McDonough and detached. These cars were then attached to another locomotive, and carried on to Columbus in charge of another conductor. Plaintiff remained in Atlanta on Saturday. On Sunday he went up to Douglasville, and returned to Atlanta, and on the Tuesday morning following boarded the train for Columbus. The conductor on the train between Atlanta and McDonough declined to accept for passage the ticket which plaintiff had purchased in Tallapoosa on the Friday previous, because it was a limited ticket, and the limit of time had expired. This train did not stop at any point between Atlanta and McDonough, and the conductor informed the plaintiff that the conductor from McDonough to Columbus would not accept the ticket for passage. After leaving McDonough, he presented the ticket to the second conductor, who refused to accept it for passage, and when the train reached Griffin the plaintiff was requested to leave the train. He declined to do so, and was ejected. Concerning the manner of ejection, there is no complaint. Plaintiff had frequently purchased tickets over the lines of the Southern Railway since 1896, but testified that he had never inspected any of those tickets to ascertain whether they were limited or unlimited. He did not know at the time it was purchased that his ticket was limited. He knew that it had holes punched in it, because he saw the agent when he made the holes, but did not look to see for what purpose they were made. After arriving at McDonough, plaintiff knew that his ticket had expired, but he thought it was possible that the conductor might pass him on it. He was informed by the second conductor that if he would take the ticket back to Tallapoosa, where it was issued, the amount of money he paid for it would doubtless be refunded. Plaintiff testified further that at the time he was ejected he had sufficient money with which to pay his fare to Columbus, but not enough to pay his fare to Columbus, hotel bill, and return passage. He also testified that the limit on the ticket gave him time to go from Tallapoosa to Columbus. It was shown that the regular fare from McDonough to Columbus

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was \$2.94, and that all local tickets issued by the Southern Railway Company are limited tickets, and good for continuous passage only. The limit is expressed by punching out the date on the margin of the ticket. The sale of limited tickets exclusively began on May 15, 1896. Each ticket shows that it is limited, and the time in which it may be used. Notices of this regulation were posted in the ticket windows and waiting rooms at all of the depots, in plain, legible type, placed in conspicuous places. The ticket which the plaintiff purchased on May 28th was limited as good for use through May 29th. The plaintiff paid regular fare for the ticket. It was also testified that the regulation for the adoption of limited local tickets was made by the railroad in 1896, for the reason that the limited ticket conferred benefits on the passenger and the railway company beyond those afforded by an unlimited ticket. If a passenger should lose his ticket, or have it stolen from him, and it has not been used within the time limited, the railway company refunds the amount paid to the purchaser. Without a limitation, no such refunding could be made, because it would be impossible to ascertain when the ticket might thereafter be used. The regulation was beneficial also to the railway company, because it enabled it to more properly check its accounts, which include sales of tickets by agents, as well as their collection by conductors; and it also diminished the opportunity for the fraudulent manipulation of a ticket either to the injury of a passenger or the revenues of the company. It was also testified that 10 or 12 tickets are daily redeemed by the defendant company. The plaintiff testified in rebuttal that he had never seen any of the notices in relation to the limitation of tickets, nor did he know that the ticket he purchased was limited.

There are many grounds set out in the motion for new trial, which, if considered, would require a discussion of many questions which, under the view that we take of this case, are not material to the ascertainment of the rights of the respective parties. After all, the merits of the case

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must depend on a solution of the question whether one who has paid full fare for transportation between two points on a railway line, and receives a ticket which bears on its face a limitation of the time in which it may be used for passage, is bound by the terms of such limitation, in the absence of any further notice or contract. It is not necessary for the purposes of this case to enter into a discussion of the question whether a ticket purchased by a prospective passenger constitutes the contract of carriage between the carrier and passenger, or whether it is in law simply a token or receipt that the passage money has been paid. Many apparently well-considered authorities go to the extent of ruling that the terms and conditions printed upon the ticket constitute the contract between the parties. Others, however, entitled to equal weight, declare that the words placed upon a ticket which the passenger receives do not constitute the contract, but that it is simply evidence of the receipt by the carrier of the passage money, and a token that a contract of carriage has been made. The latter view seems to be more in accord with the views heretofore expressed by this court in several cases than the former. It may not be amiss, however, to remark that it is somewhat singular that, admitting the ticket to be only the token of a contract, yet, when that token bears on its face statements that the contract of which it is an evidence is subject to certain limitations and conditions, that the contract is not in any way affected thereby. If in an ordinary business transaction one receives from another a sum of money as a consideration for the performance of a particular act, and as evidence of such payment issues a receipt therefor, containing stipulations as to the character and terms of the performance to be made, such terms and manner of performance, if not binding, in any event are at least *prima facie* of conditions which are binding on both parties. But, whatever may be the legal status of a ticket with reference to the contract of carriage, a discussion of the question would not be profitable here. The contention made by the plaintiff in error is that

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when the defendant in error contracted with it to be transported by the Southern Railway Company over its lines from Tallapoosa to Columbus, Ga., it did so on the condition that the passage was to be continuous, and to be made within two days from the time of the issue of the ticket; that the time was ample within which such journey might be made with comfort and convenience; that by reason of certain rules and regulations which the carrier had made in the conduct of its business the passenger could not make his journey, or any part of it, after the expiration of two days from the date of the contract for passage, and that after such

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limit the ticket was void for passage. To this contention the defendant in error replies that at the time he purchased the ticket he made no express contract with the carrier as to the time in which his journey was to be performed, but that he paid full fare for his passage, that he had no knowledge or notice at the time that he received it that the ticket bore on its face any limitation as to time, and that under the provisions of our law as embodied in section 2276 of the Civil Code the carrier was bound to transport him under the contract from Tallapoosa to Columbus at any time within the period governing the limitation in which such contracts may be enforced. The provisions of this section of the Code are: "A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold. He may make an express contract, and will then be governed thereby." We do not propose to enter here into a discussion of the proper application of the provisions of law which the section contains. That has been done in the case of *Railway Co. v. Lippman* (this term), 36 S. E. 202. It is insisted that the rule here announced is applicable to passenger carriers. If that be a correct proposition, then by these words of the Code, as construed by the defendant in error, a passenger carrier would have the right by an express contract to limit his liability (meaning thereby his duty to exercise extraordinary

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diligence for the safety of the passenger). For the reasons fully given in the discussion of the legal principles involved in the case last cited, *supra*, it is our opinion that the provisions of this section of the Code do not apply in any way to a carrier of passengers, but they apply exclusively and alone to a common carrier; that is, a carrier of goods. But we go further than the point to which the argument of the defendant in error would lead, and say that, in our opinion, a carrier of passengers cannot limit his obligation to exercise extraordinary diligence for the care of his passengers by a notice or publication, nor can he do so even by an express contract, because such a contract would be void, as being against public policy,—for a discussion of which proposition see case of Railway Co. v. Lippman, *supra*. If the plaintiff below was entitled to have a recovery against the defendant, that right existed because the railway company invaded some legal right of the plaintiff. If the ejection, which was clearly shown, was unauthorized, it was a tort committed upon the person of the defendant in error. On the contrary, if there was no breach of legal duty on the part of the plaintiff in error towards the passenger, then no right of recovery existed in the latter. We do not understand that the plaintiff in error in this case denies its liability to in any manner limit the duty which the law imposes upon it as a passenger carrier, either by notice or by express contract. It is, however, insisted against the right of the defendant in error to sustain the verdict which was rendered in his favor: First. That all contracts of carriage made by the defendant railway company with a passenger had a time limit, in which the contract of carriage should be performed. Second. That such contract resulted from a rule and regulation which the railway company had found necessary to make for the protection of the passenger and the orderly and successful conduct of its business as a passenger carrier; that, in accordance with such rule and regulation, the contract entered into with the plaintiff below limited the time in which he could be

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carried from Tallapoosa, Ga., to Columbus, Ga., to two days, and that this was ample time, consulting the comfort and convenience of the purchaser of the ticket, in which the journey might be made. Third. That this rule and regulation under which the contract of carriage involved in this case was made, and the ticket was issued, was fair and reasonable. This contention necessarily brings us to an inquiry concerning the power of a carrier of passengers to make rules and regulations for the conduct of its business. It is provided by section 2278 of the Civil Code that a carrier is bound to receive all passengers offered that he is accustomed to carry, upon compliance with such reasonable regulations as he may adopt for his own safety and the benefit of the public. So far as we are informed, both text writers and the rulings made in adjudicated cases are unanimous in support of the proposition that a carrier of passengers may make reasonable regulations as to the conduct of its business. Not only so, but Mr. Hutchinson declares on authority that the passenger takes his ticket always with the understanding that he will conform to the reasonable regulations of the carrier as to the conduct of the carriage, and that obedience to such regulations is a condition of the contract to carry, though not expressed in the contract, or known to the passenger; but that the carrier cannot, by regulations or usages unknown to the passenger, deprive the latter of rights conferred upon him by his ticket, which contained no notice of such limitations. *Hutch. Carr.* § 587. It was said by BROWN, J., in the case of *Hibbard v. Railroad Co.*, 15 N. Y. 455, that such regulations as would enable a railroad corporation to execute its difficult and responsible duties, insure the comfort and safety of its passengers, and protect itself from wrong and imposition, it has an undoubted right to prescribe, provided such regulations are reasonable and just.

It is contended here that rules and regulations limiting the time within which a ticket over its route shall be good

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for passage may be made by the carrier, and that, when so made, if the time limited be reasonable, the stipulation is good in law. On this subject Mr. Hutchinson, in section 576 of his work on Carriers, says that "the company may lawfully limit the time within which the ticket shall be used," for which proposition he cites *Hill v. Railroad Co.*, 63 N. Y. 101; *Elmore v. Sands*, 54 N. Y. 512; *Rawitzky v. Railroad Co.*, 40 La. Ann. 47, 3 South. 387; *Barker v. Coffin*, 31 Barb. 556. In his treatise on the Law of Railroads (volume 3, p. 1638), Mr. Wood declares that the carrier may impose any reasonable limitation as to time; that a ticket "good only two days after date," or "for this day and train only," ceases to have any validity after that date, although it has never been used; citing *Railroad Co. v. Proctor*, 1 Allen 267; *Gale v. Railroad Co.*, 7 Hun 670. Mr. Elliott, in his Law of Railroads (volume 4, § 1598), declares that "the right of a railroad company to limit the time within which a ticket over its road shall be good is well settled," for which he cites *Churchill v. Railroad Co.*, 67 Ill. 390; *Pennsylvania Co. v. Hine*, 41 Ohio St. 276; and a number of additional authorities in note 3, p. 2496. We have preferred to take the terse statement of the rule laid down by these text writers, rather than to make quotations from the authorities cited. An examination, however, of the cases which these authors have cited to support the doctrine shows that the rules enunciated are supported by the adjudications made. In the case of *Elmore v. Sands*, 54 N. Y. 512, quoted by Mr. Hutchinson, *supra*, it was said in the opinion that: "Railroad companies carrying passengers have the right to make reasonable rules and regulations for conducting their business, and they and their agents incur no liability in enforcing them in a proper manner. * * * He had his option either to pay upon the train, or to purchase the ticket, and exhibit that as evidence of his right to ride. The railroad company was not bound to issue the ticket in advance of the day on which

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it was to be used, and had the right to insist and provide that it should be used on the day when it was issued." In the absence of any statutory provision which contravenes them, the principles ruled by the authorities to which we have referred, the reasoning adopted by the different courts which reached the conclusion announced seeming to be sound and founded upon clear principles of right, are entitled to great weight, if, indeed, they are not satisfactorily conclusive of the question involved. But it is strongly urged upon us that the decisions of this court heretofore made in the cases of *Phillips v. Railroad Co.*, 93 Ga. 356, 20 S. E. 247; *Boyd v. Spencer*, 103 Ga. 828, 30 S. E. 841; *Railway Co. v. Barlow*, 104 Ga. 213, 30 S. E. 732, and *Railway Co. v. Ricks* (Oct. term, 1899), 34 S. E. 570, are in conflict with the rulings made in the various cases to which we have referred, and opposed to the reasoning of the courts which reached the conclusions expressed. We are aware that much of the language which appears in the discussion of each of these cases will support this criticism, and that in some of these cases the provisions of section 2276 are recognized as applicable to the carriers of passengers, but it must be borne in mind that in none of them was it insisted that the provisions there incorporated applied exclusively to common carriers,—in other words, carriers of goods,—and also that in no one of these cases was the question whether a time limit placed upon a ticket in pursuance of a regulation bound the passenger as a rule of the company governing the contract of passage. On the contrary, in none of them were these questions made or decided, and no court is bound by any adjudication when it is sought to make that adjudication applicable to a question not then made or considered. Because of the defenses made in those cases, we have no criticism to make of the judgments there rendered. The ruling made in the present case is not based on the ground that section 2276 of the Civil Code does not apply to a carrier of passengers. We have in another case endeavored to show that it does not. But, whether it does or not, the rulings here made do not

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rest on its provisions. A review of the rulings made in these cases is had in the Lippman Case, *supra*. All the authorities which support the doctrine that a railroad company may, by rules and regulations, limit the time in which a ticket can be used for passage, concur in the view that such regulations must be reasonable, and whether or not a regulation of this character is or is not reasonable is a question to be determined by the court. On this subject, the rule, as we understand it, is that, where the facts are not disputed, the reasonableness of a regulation of a common carrier affecting the transportation of passengers is one of law for the court, and not of fact for the jury. *Railway Co. v. Adcock*, 52 Ark. 406, 12 S. W. 874; *Railway Co. v. Hardy*, 55 Ark. 134, 17 S. W. 711; *Railroad Co. v. Rhodes*, 25 Fla. 40, 5 South. 633; *Gregory v. Railway Co. (Iowa)*, 69 N. W. 532; *Chilton v. Railway Co.*, 114 Mo. 88, 21 S. W. 457. See, also, *Central Railroad & Banking Co. v. Brunswick & W. R. Co.*, 87 Ga. 386, 13 S. E. 520; *Railway Co. v. Johnson*, 90 Ga. 501, 16 S. E. 49; *Railroad Co. v. Moore*, 94 Ga. 457, 20 S. E. 640; *Railroad Co. v. Bussey*, 95 Ga. 591, 23 S. E. 207.

This brings us to the question next in order; that is, whether or not such a rule is reasonable. It has been so often determined that such is a reasonable rule by the authorities cited in the foregoing part of this opinion that the ruling which we make that it is is rendered very much stronger by the sanction of the many eminent jurists presiding in the courts of last resort in very many of the states of the Union. Under ordinary circumstances, when a plain ticket is issued without conditions or limitations to a prospective passenger, that ticket can be made nothing but a receipt or token, and only shows that the person holding it is entitled to be transported between certain named points; and it cannot be questioned that the holder of it may use it at his pleasure within the statutory period for the enforcement of a contract. This right, however, is not without its burdens. If the ticket be

Same—Same—
Same.

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lost or stolen, it can as well be used by another as by the one who purchased it. It cannot, from any fair view, we think, be considered unreasonable that the carrier may provide a method by which, if a railroad ticket is lost, or if, for some unforeseen cause, the purchaser is unable to use it within the time limit, if it be limited, that it may be redeemed, or, if the purchaser travels only a part of the distance to which the ticket entitles him to go, that the part remaining unused may be redeemed. Certainly such regulations provide a protection to *bona fide* passengers, and as to them and to the public there can be nothing unreasonable in such regulations. On the other hand, it is but reasonable that the carrier may prescribe a rule by which he may know how many persons are to travel on a particular train during a given day or time. It is not unreasonable for the carrier to confine the passage contracted for to the person to whom it has contracted to carry, and it is nothing more than reasonable that the carrier should have an opportunity to receive from all persons who have occasion to travel over its lines the compensation which the law allowed it to charge; and, inasmuch as it is able with the limitation of time, taken in connection with the obligation of the carrier, to make a redemption of unused or partly unused tickets when so limited, it is reasonable,—not only reasonable, but just; just not only to the carrier, but to the passenger as well. And such a regulation being, as we have attempted to show, within the limit of the power of the carrier to prescribe, and reasonable, there seems to exist no reason why the rule which was in force and promulgated at the time the defendant in error purchased his ticket for passage should not be maintained. It follows from what has been said that the defendant in error, by reason of the rule adopted by the carrier for the transportation of passengers, was not entitled to use the ticket which had been issued to him after the expiration of the time limit placed upon it. He should have paid his fare, and caused the ticket to be redeemed. As he failed to do so, but insisted on his right to use the ticket for

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passage, no right of action accrued to him to recover damages for his expulsion from the train in the manner in which it was shown to have been done by the evidence in the case. The court having refused to give in charge to the jury certain requests properly made, which embodied the views of the law which govern the case as herein indicated, the court committed error in overruling the motion for a new trial.

It is but a matter of justice for us to say here that, in addition to the very able and comprehensive briefs submitted by the counsel in this case, we have derived much assistance from the excellent briefs of Messrs. Dorsey, Brewster & Howell and Sanders McDaniel, counsel for plaintiff in error in the case of *Railway Co. v. Dyson*, 109 Ga. —, 34 S. E. 997, in which the leading questions discussed here were made, but in which it was not necessary that they should be decided. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

STONER

v.

CHICAGO G. W. RY. CO.

(*Supreme Court of Iowa, Oct. 25, 1899.*)

Carriage of Freight—Verbal Agreement—Written Agreement after Loading on Car—Question for Jury.*—Where there is a verbal agreement for the carriage of freight, under which the shipper loaded it upon the car, the carrier cannot modify such agreement, by, subsequently, merely presenting to the shipper a receipt for the goods, without directing the shipper's attention expressly to its provisions and procuring his assent thereto; and it was a question for the jury whether the contract of shipment in question was verbal, or was expressed by a receipt presented after the freight was loaded on defendant's car.

*See *Louisville & N. R. Co. v. Cooper* (Ky.), 17 Am. & Eng. R. Cas., N. S., 304, and *foot-note*.

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Case at Bar.—In the case at bar, there could be no recovery ; as it appeared that but for plaintiff's failure to perform his part of the contract of shipment defendant's part would have been fulfilled.

APPEAL, by plaintiff from Butler county district court.
Affirmed.

M. F. Edwards and *J. H. Scales*, for appellant.

O. C. Miller, for appellee.

ROBINSON, C. J. In September, 1896, the plaintiff was the owner of a merry-go-round, which was in the town of Allison. He desired to have it transported to Webster City by the 22d day of the month, for the purpose of operating it there during the annual fair, which commenced on the 23d, and continued three days. He claims that the agent of the defendant at Allison verbally agreed in behalf of the defendant to transport the merry-go-round from Allison to Webster City by way of Waterloo, to make connection with and deliver to the regular local freight train over the Illinois Central Railroad at Waterloo on or before the afternoon of September 20th, thence to be transported to Webster City in the afternoon of Tuesday, September 22d; that the merry-go-round was delivered to the defendant for carriage under that agreement, but that the defendant failed to transport it over the route agreed upon; that there were unnecessary and unreasonable delays in the transportation of the merry-go-round, and on the last day of the fair it was at Waterloo, and did not reach Webster City in time for use. The defendant denies that it received the merry-go-round for shipment to Waterloo, to be there delivered to connecting lines for transportation to Webster City, but avers that it was to be delivered to connecting lines at Waverly for transportation to Webster City. The defendant denies that a verbal agreement for the transportation of the property was made, and avers that the agreement was in writing, and fully performed on its part, and that by the terms of the agreement it was not liable for any delay in the transportation of the property by connecting lines. The district court, in sustaining the motion to

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direct a verdict, said: "I think on the record of this whole case, as it stands, the court would not be warranted in sustaining a verdict here on the admitted facts in the case. It seems now to be clearly shown that the property in question was not received by this company in time for any train before the train by which it was actually shipped, and that it was immediately shipped and transferred to the other line of road. If there was any damage, it wasn't through the fault or neglect of this defendant. I think that affirmatively appears now from the evidence that is uncontradicted. With that condition of the record, this motion should be sustained."

1. There was evidence which tended to show the following: On Friday, September 18th, the plaintiff applied to the agent of the defendant at Allison for information in regard to the shipment of the merry-go-round to Webster

City, telling him that, unless it could be shipped by rail so as to reach Waterloo in time for the west-bound way freight train of the next Monday morning, he would haul it across the county

Carriage of
Freight—Verbal
Agreement—
Written Agree-
ment after Load-
ing on Car—Ques-
tion for Jury.

to Aplington, at the same time stating that he had a contract with the fair association at Webster City to run the merry-go-round at that place during the fair. The agent assured the plaintiff that he could furnish a car, and have it at Waterloo by Sunday afternoon. In answer to a suggestion of the plaintiff that it would be nearer to ship by Hampton, the agent said that it would be "just as quick the other way, and that it would go over their line of road to Waterloo." Nothing was said in regard to shipping by way of Waverly. The agent also said that the car should be loaded and ready to go out Saturday, and the merry-go-round was loaded in a car of the defendant under the arrangement thus made with its agent. The car was hauled to Waverly, and there delivered to the Illinois Central Railway Company in the morning of Monday, September 21st. There were no trains south on the road of that company until the next day, when the car was hauled to Waterloo. Had it been sent out from Waterloo on the first west-bound freight train, it would

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have arrived at Webster City at 6 o'clock in the afternoon of that day. It was within the apparent power of the agent of the defendant to contract with the plaintiff for the delivery of the car to the connecting line at Waterloo within a specified time, and, in the absence of knowledge of the limitation of his power to bind the company by his agreement, the plaintiff had the right to rely upon it as binding upon the defendant. *Rudell v. Transit Co.* (Mich.), 76 N. W. 380, 5 Am. & Eng. Enc. Law (2d Ed.) 351; *Wood v. Railway Co.*, 68 Iowa 491, 24 Am. & Eng. R. Cas. 91, 27 N. W. 473. It appears, however, that two hours after the car was loaded the plaintiff informed the agent that it was ready to be taken out, and the agent then handed him a folded paper, which he placed in his pocket. The agent did not say what it was, and the plaintiff did not read it. The paper proved to be a receipt for the property, which contained a provision to the effect that it was to be transported on the conditions indorsed on the receipt. Among those conditions were the following: The defendant did not undertake to carry the property by any particular train, nor to be responsible for loss or damage arising from any delay or stoppage, however occasioned, but agreed to forward the property "with as reasonable dispatch as the general business of the corporation" would permit. It was also provided that no station agent or clerk had authority to alter or vary any of the conditions set out. Did the evidence show beyond controversy that the receipt and the conditions thereon express the contract between the parties? It is in conflict with the verbal agreement testified to by the plaintiff and others. It is not shown that the plaintiff had any knowledge that the agent lacked authority to make the representations and verbal agreement upon which the plaintiff relies, and the burden was on the defendant to show such knowledge, or to show that the writing was accepted by the plaintiff as the contract. The jury would have been authorized to find that the defendant had failed to show such knowledge or acceptance. If there was a valid verbal agree-

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ment, under which the plaintiff accepted and loaded the car, the defendant could not have varied or modified it, without the concurrence of the plaintiff, by delivering the receipt after the car was loaded; and assent of the plaintiff to the alleged change cannot be inferred from his acceptance of the folded writing, the contents of which he did not know, and of which he was not informed. The facts in *Strohm v. Railway Co.*, 21 Wis. 554, were in some respects similar to those involved in this case, and it was there said of the shipper: "Having previously entered into a special verbal agreement, he may rightfully assume, in the absence of notice to that effect, that it is embodied in the paper or receipt, or, at least, that the receipt contains nothing contrary to it. It is in the nature of a direct fraud or cheat for the company or its agents, after having entered into a verbal agreement, thus wrongfully to insert a contract of an entirely different character, and present it to the party without directing his attention expressly to it, and procuring his assent. It is no answer for the company in such a case to say that the other party should have been more diligent and watchful, and should have detected the fraud. So long as he is ignorant of the new conditions, and does not assent to them, the contract in writing is not consummated, and parol evidence may be received." See, also, *Railway Co. v. Wood* (Tex. Civ. App.), 30 S. W. 715; *King v. Woodbridge*, 34 Vt. 564. This case differs from those upon which the defendant relies. In *Mulligan v. Railway Co.*, 36 Iowa 181, the statements of facts justify the conclusion that there was no verbal contract of carriage; that the shipper knew that the carrier relied upon the bill of lading which it delivered to him as expressing the contract; and that, knowing that such was the case, the shipper neglected to read the bill of lading. It was said that under such circumstances he could not rely upon lack of knowledge of its contents. In the cases of *Robinson v. Transportation Co.*, 45 Iowa 470, *Garden Grove Bank v. Humeston & S. Ry. Co.*, 67 Iowa 526, 23 Am. & Eng. R. Cas. 695, 25 N. W. 761, and *Hewett v. Railway Co.*, 63 Iowa

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611, 18 Am. & Eng. R. Cas. 568, 19 N. W. 790, the contracts were evidenced by bills of lading, and there was no claim, as in this case, that the contracts were verbal. We conclude that whether the contract of shipment was verbal, or was expressed by the receipt and the conditions therein, was a question of fact for the determination of the jury.

2. The plaintiff testified that the verbal contract for the shipment of the merry-go-round required that it be loaded in the car in time to be sent out on Saturday, but the uncontradicted evidence shows that the car was not loaded and ready to be sent out until too late for the freight train of that day. The defendant could have sent the car to Waterloo over its own line, but there was no transfer track at that point over which the car could have been transferred to the Illinois Central track. Therefore the route over which to take the car to be placed on the Illinois Central Railway at Waterloo was to deliver it to that road at Waverly. Had the car been ready to go out on Saturday, it would have been delivered in Waverly in time to have been sent to Waterloo on Sunday, and the contract of the defendant would have been fulfilled. It thus appears that the failure of the plaintiff to perform his part of the contract was the direct cause of the delay in sending the merry-go-round to Waterloo, and he cannot base a recovery on his own wrong. We conclude that the district court properly directed a verdict for the defendant, and its judgment is affirmed.

CLEVELAND, C. & ST. L. RY. CO.

v.

TARTT.

(Circuit Court of Appeals, Seventh Circuit, Jan. 25, 1900.)

Duty to Trespassers on Right of Way.*—As between a railroad company and a trespasser on the right of way, no duty of care to avoid injuring him arises until those in charge of the train have

*See 13 Am. & Eng. R. Cas., N. S., 824 *et seq.*, note.

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discovered his presence on or dangerously near the track, and have reasonable cause to believe that injury will result unless the progress of the train is arrested.

Same—Speed in Violation of Ordinances.*—In an action for injury to a trespasser by a railroad train, plaintiff cannot successfully complain because the train was running at a dangerous rate of speed, in violation of a municipal ordinance.

Injury to Trespasser—Willful Negligence—Pleading.—In such an action, to raise the issue of willful injury, the intention to inflict the injury must be directly and explicitly alleged.

ERROR by defendant to the circuit court of the United States for the Southern district of Illinois. *Reversed.*

George F. McNulty, for plaintiff in error.

A. R. Taylor, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

BAKER, District Judge. This case has been before this court, when it was reversed and remanded, with instructions to grant a new trial, and to permit the declaration to be amended. *Railway Co. v. Phillips' Adm'r*, 24 U. S. App. 489, 12 C. C. A. 618, 64 Fed. 823.

Case Stated.

On the return of the case a new trial was granted, and the declaration was amended by simply inserting the word "willful" in three places next before the word "negligence." The evidence on the last trial differs in no essential particular from that on the former, except that upon the last trial evidence was introduced showing that the train could have been stopped within the distance of 2,000 feet, or thereabouts. The statement of facts found in the former report of this case, except the evidence in reference to the distance within which the train could have been stopped, is adopted as a substantially correct statement of the facts in the present case. To set out the numerous instructions given and refused to which exceptions were taken would needlessly protract this opinion. The record contains 52 assignments

*See *Sutherland v. Cleveland, etc., Ry. Co.*, 8 Am. & Eng. R. Cas., N. S., 424, and *notes*, 428 *et seq.*

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of error. The instructions are not entirely harmonious in their statement of the legal principles applicable to the case, and it is not apparent how the jury could have reached the verdict they did, if they had been governed by the instructions given. But, as the case ought to be reversed for error in refusing to direct a verdict for the plaintiff in error, a careful examination of the other errors assigned is unnecessary.

It was decided when the case was here before that the deceased was, at the time he was killed, a trespasser or mere naked licensee on the right of way of the plaintiff in error, and, as such, that it owed him no duty of care to provide against accidents to him. We also held that the court erred in refusing to direct a verdict in favor of the plaintiff in error on the ground that the evidence was insufficient to justify a submission of the case to the jury. These rulings became the law of the case, and must control the decision on the present writ of error, unless the case made by the evidence differs in some material and controlling aspect from that made on the former trial. A careful study of the evidence which is in the record fails to disclose any material difference, except that in relation to the distance within which the train could have been stopped. That the deceased was a trespasser or mere naked licensee at the time he was killed is clearly shown, and is the settled law of the case; and as no new or additional evidence was produced, except as above stated, the court below, in obedience to the opinion of this court, ought to have sustained the request of the plaintiff in error to direct the jury to find a verdict in its favor. But, if this was the first time this case was before us, the result must be the same. The undisputed evidence shows that the deceased and his son were trespassers on the right of way of the plaintiff in error at the time he was killed. The evidence fails to show negligence on the part of the plaintiff in error or its servants which was the proximate cause of the death of the plaintiff's intestate. It is firmly settled that it is not the duty of the employees operating a railroad train to exercise

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care and diligence in looking for trespassers on the railway track, and that no duty of care in respect of such trespasser arises until he is seen upon or so near the railroad track as to show that he is liable to injury from the train moving thereon. Nor does it become the duty of the trainmen to arrest the progress of their train as soon as they discover a trespasser on or dangerously near the track. They have the right to proceed on the assumption that the trespasser, having a due regard for his own personal safety, will voluntarily withdraw from the track, and not remain in a place of known danger until he is injured or killed. It is only when it becomes apparent that such trespasser is either unaware of, or unable to avoid, impending danger, and when those in charge of the train have reasonable cause to apprehend that injury will probably result unless an effort is made to stop the train, that it becomes their duty to do so.

As between the railway company and the trespasser, no duty of care to avoid injury arises until those in charge of the train have discovered his presence on or dangerously near the track, and have reasonable cause to believe that injury will result unless the progress of the train is arrested. Although the railway track may be level and straight, so that those in charge of the train by the exercise of due care might have seen the trespasser long before they did, still such negligent failure to discover his presence on or near the track will of itself constitute no actionable wrong of which he can complain.

If the train is running at a high and dangerous rate of speed, in violation of an ordinance, it is mere negligence, of which the trespasser cannot successfully complain; nor in such a case would any special duty of care arise until the presence and apparent danger of the trespasser was actually discovered. Hence, even if those employed on the engine which killed the plaintiff's intestate could have seen him when he was 2,400 feet from the train, their failure to discover his presence or that of his son until the train was a little more than 700 feet

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from them would give no right of action. There was no evidence offered on behalf of the plaintiff below to prove that the employees on the train actually discovered the presence of the deceased or his son on or near the track until just before the accident happened. The evidence clearly shows that the presence of the deceased and his son on the track was not actually discovered by any of the trainmen until the train was within less than 800 feet from them, and that as soon as they were seen the danger signal was sounded, the emergency brakes applied, and everything was done which with due care for the safety of the train and its passengers could have been done in the exercise of ordinary care and prudence, and that the train was actually stopped within 2,000 feet or thereabouts from the point where the train was when the deceased and his son were first seen upon or near the track. The case made by the evidence was such as made it the duty of the court to grant the request of the plaintiff in error to direct a verdict in its favor. Deciding, as we do, that the court erred in refusing to direct a verdict for the plaintiff in error, it becomes unnecessary, and would not be profitable, to consider the other 51 errors assigned.

WOODS, Circuit Judge (concurring). When this case was first here, our ruling was that "the declaration * * * counts upon negligence, and not upon willfulness, as the ground of action," and that it was therefore unnecessary to express an opinion whether, upon the facts disclosed, the action could be maintained for a willful injury. Apparently for the purpose of raising that issue the declaration was amended by inserting the word "willful" to qualify the alleged negligence, so that as amended the charge is that the defendant's servants, with gross, reckless, wanton, and willful negligence, failed to reduce the speed of the engine, and to give any signal or warning to the deceased and his child of the approach of the train by which they were run down. Manifestly, the amendment did not affect the essential character of the charge. It is one thing to allege the willful or inten-

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tional infliction of an injury, and quite another to allege the willful doing or omitting to do something which caused, or contributed to the causing of, the injury. The defendant's servants, according to the amended averment, willfully (that is to say, knowingly and purposely) failed to reduce the speed, and to give to the deceased any signal or warning of the approach of the train; but it is not alleged or implied that there was in the mind of the engineer or fireman any intention to inflict injury, or any perception that the deceased and his son were not properly regardful of the situation, and would avoid harm, as they might easily have done, by stepping aside. "Willful or intentional injury," as we said before, "implies positive and aggressive conduct, and not the mere negligent omission of duty"; and the willful omission to do something which duty requires, it is equally clear, does not of itself imply an intention to injure, and such intention should not be imputed unless directly proven, or, under the circumstances, that result must have been perceived to be probable. In other words, as a matter of pleading, it is the same whether an act or an omission to act be alleged to have been negligent or intentional. If it be sought to charge a willful injury, the intention to inflict it must be directly and explicitly alleged. As a matter of proof, it may be enough to show negligence of such gross, wanton, or willful character as to justify the inference of an intention or willingness to injure. It is easy to suppose circumstances or conditions which, if they did not in the particular case justify an omission to retard the speed of a train, or to sound the whistle sooner than it was sounded, would exclude all suspicion of bad faith. The engineer in this instance might have seen the deceased upon the track 2,000 feet away, instead of 700 feet, as he testified; and, disregarding his testimony, the jury may have inferred that he ought to have seen, and did sooner see, the deceased upon the track. But, that conceded, there is no evidence whatever to justify an inference that he entertained any purpose or had any thought of harming the deceased or his boy.

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The affirmative testimony of a number of witnesses is that the alarm whistle was sounded when the engine was near 700 feet from the point of collision, and against that is the testimony of a single witness that she heard neither bell nor whistle. The affirmative testimony, it is clear, ought not to be considered as overborne by the negative; but, whether the truth in this respect was one way or the other, the case was, at most, one of negligence only, against one whose position as a trespasser made a right of action on that ground alone impossible. That he was a trespasser upon the track of the defendant's road is conceded in the brief for the defendant in error. The trial proceeded throughout on that theory, and no question, it is admitted, was made upon the point; but it is insisted that the defendant's servants, notwithstanding the negligence of the deceased, could, after discovering the peril, have averted it by timely warning, or by slackening the speed of the train. On this point reference is made to *Cahill v. Railway Co.*, 46 U. S. App. 85, 20 C. C. A. 184, 74 Fed. 285; *Railroad Co. v. Morlay*, 58 U. S. App. 526, 30 C. C. A. 6, 86 Fed. 240; *Anderson v. Hopkins*, 63 U. S. App. 533, 33 C. C. A. 346, 91 Fed. 77, and other cases, as overthrowing the doctrine that there can be no recovery for an injury to a person wrongfully upon a railroad track unless the injury was willful or intentional. The *Cahill Case* is plainly distinguishable; and the doctrine of the *Anderson* and *Morlay Cases* is manifestly not applicable here, because in this case the deceased and his son were not perceived by the engineer to be in a position of peril from which they were not likely to escape by their own exertions.

The only tangible proof of negligence which went to the jury was that the train by which the deceased was killed was running at the rate of fifty to sixty miles an hour, in violation of an ordinance of the town which forbade a speed exceeding ten miles an hour. The proof of that ordinance should have been withdrawn from the jury. It consisted of a copy of the ordinance, with a certificate of the town clerk attached, verifying the ordinance, and certifying that it was

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passed on July 7, 1877, and was duly published. This certificate was attached to the ordinance as found in a printed book of ordinances, which contained copies of other ordinances of the town of Venice; and it is claimed, on the statement of a witness, that a copy of that pamphlet was kept or preserved by the town board. The book, however, did not purport to be published by authority of the board of trustees or city council, and therefore was not admissible, under the statute, as evidence of the passage and publication of the ordinances found in it. *Lindsay v. City of Chicago*, 115 Ill. 120, 3 N. E. 443. And while, as shown by the opinion in that case, the certified copy of the ordinance was competent and *prima facie* evidence of the passage and publication of the ordinance, yet when it was shown, as it was, that in the original record there was no notation at the foot of the ordinance of the fact or date of publication, upon which the clerk could have based his certificate, and further was shown by the testimony of the clerk, who made the certificate, that he knew nothing of the fact, and did not intend to certify to the publication of the ordinance, but signed the certificate as prepared and presented to him by counsel for the defendant in error, the force of the certificate in that respect was destroyed, and there remained no adequate proof of the publication of the ordinance. But, if the publication of the ordinance were conceded, its violation by the defendant was, at most, evidence of negligence only, and afforded no ground for recovery for injury to a trespasser. The train by which the intestate was killed was running on time, and at its usual speed, as for two years or more it had been run, and as, to the knowledge of the deceased, it had been run for six weeks or more before the date of the accident. He probably had no knowledge of the ordinance, and certainly neither counted, nor had the right to count, upon the train being run in accordance with its requirement. The judgment below is reversed, and the cause remanded, with directions to grant a new trial.

Wright v. Union R. Co

WRIGHT

v.

UNION R. Co.

(Supreme Court of Rhode Island, Feb. 21, 1900.)

Ejection of Trespasser — Assault — Justification — Pleading.* — Plaintiff alleged that defendant, in ejecting him from a car, kicked and struck him many violent blows, and also threw him from a great height, with great force and violence to the ground, while the car was moving at a high rate of speed, whereby he was greatly bruised. Defendant's plea of justification was that plaintiff was stealing a ride on the car, and that he was ejected by the use of only necessary force. *Held*, that such plea was demurrable, as it did not set forth circumstances showing that the acts charged were reasonably necessary.

Demurres to defendant's plea sustained.

John S. Murdock and Frederick A. Jones, for plaintiff.
David S. Baker, for defendant.

STINESS, J. The plaintiff sues for assault and battery, alleging that the defendant kicked and struck him many violent blows, and also threw him from a great height (from the platform of an electric car), with great force and violence, to the ground, while the car was moving at a high rate of speed, whereby he was greatly bruised. The defendant pleads in justification that the plaintiff was a trespasser stealing a ride on the car, and that he was ejected by the use of only necessary force. The plaintiff demurs to the plea. A plea of justification is one of confession and avoidance. It must meet and justify the cause of action stated in the declaration. It is not enough to justify only in part. The defendant claims that, in justifying the assault simply, he has done

*See *Young v. Texas & P. Ry. Co. (La.)*, 14 Am. & Eng. R. Cas... N. S., 831, and *foot-note*.

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all that he is bound to do, because the other allegations are only matters of aggravation. We do not think this is so. When a declaration alleges acts of such a character as to go beyond a simple assault, they are not to be regarded merely as matters of aggravation, but substantive charges of violence in connection with the assault. Thus, it is said in Story, Pl. p. 493, note, that a man cannot plead that he threw stones *molliter* against a trespasser to remove him; nor justify a wounding, nor striking repeated blows and knocking the plaintiff down, in order to turn her out of the defendant's house. See, also, Wat. Tresp. § 237; Gould, Pl. p. 331, c. 6, § 98. In Robinson v. Hawkins, 4 T. B. Mon. 135, a plea of *molliter manus* to an action of assault and battery and wounding was held not to justify the wounding, without alleging that the defendants were first endangered. To the same effect is Boles v. Pinkerton, 7 Dana 453, and Gray v. Ayres, *Id.* 375,—a case of tarring and feathering. The reason for this requirement in pleading is that it does not assume a declaration alleging extraordinary or aggravated violence, because the right set up by the defendant "does not primarily authorize, nor its exercise require, anything more than gentle and moderate force," while it admits an immoderate and aggravated use of it. Mellen v. Thompson, 32 Vt. 407. Assuming the facts to be proved simply as pleaded, the court would have to instruct the jury that the plea was no justification, because the excessive force made the defendant a trespasser *ab initio*. If the facts alleged would be no justification in evidence, they cannot be such in pleading. Ordinarily the question of excess usually arises on a replication *de injuria*, but this is in cases where the plea appears to justify the assault charged. In this case the assault charged is not simply in striking, etc., as in an ordinary assault, but also in throwing the plaintiff to the ground from a swiftly-moving car. We think that the defendant, to justify such a charge, should set forth circumstances which would show that an unusual act of this kind was reasonably necessary. The demurrer to the plea is sustained.

Denver, etc., R. Co. v. Spencer

DENVER & R. G. R. Co.

v.

SPENCER *et al.**(Supreme Court of Colorado, May 21, 1900.)*

Injury to Person at Station to Meet Passenger—Negligence—Question for Jury.—Deceased, for the purpose of meeting his daughter-in-law whom he expected to arrive upon one of defendant's trains, was upon a space between two tracks, used by the railroad company to receive and discharge passengers. There was a truck upon such space which, though originally so placed that it would not come in contact with trains on either track, was so constructed as to be easily veered so as to be in a position to be struck by a train. Deceased's death was the result of such truck being struck by a train and hurled against him. *Held*, that it was a question for the jury whether placing the truck between the tracks was negligence.

Same—Liability.*—A railroad is liable for the death of a person, while he is at its station for the purpose of meeting a passenger expected to arrive upon one of its trains, where the death is caused by the negligence of its employees, without contributory negligence.

Same—Contributory Negligence—Question for Jury.—Whether deceased was guilty of contributory negligence in not realizing and avoiding the danger, was a question for the jury.

Same—Evidence of Conversation.—Testimony of a third person as to what he remembered and understood was the conversation between deceased and his daughter-in-law, with respect to her request that deceased should meet her on her arrival upon such train, was not subject to objection as declarations of a third person.

Death of Parent—Measure of Damages.—In an action for such death by the children of deceased, the measure of damages was the pecuniary loss sustained by them by reason of the death of their father; and a verdict of \$4,000 was excessive; as his wife survived him about two years, and plaintiffs were in no manner dependent upon him, and his expectancy of life was only about 9½ years, and his annual income arising from his own exertions, after deducting his personal expenses, was only about \$1,000 per annum.

*See *Whitley v. Southern Ry. Co.* ((N. Car.), 12 Am. & Eng. R. Cas., N. S., 210 and *note*, p. 212.

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APPEAL by defendant from Arapahoe county district court.
Reversed.

Wolcott & Vaile and *Henry F. May*, for appellant.
N. Q. Tanquary, for appellees.

GABBERT, J. At the station of Colorado Springs appellant maintains several parallel tracks. At the time deceased received the injuries resulting in his death, one of these tracks, adjacent to the station proper, was occupied by a Rock Island train, which was Case Stated. "cut" to allow access to trains arriving on tracks beyond. Employees of appellant left a truck, used for handling baggage, between the track occupied by the Rock Island train and the one next beyond, so situate, it is claimed, that trains upon each of the tracks between which it was placed would clear it. When these tracks were each occupied by trains, the space between the sides of the cars would be 5 feet 8 inches in width. The width of the truck was such that, if placed equidistant between the two tracks, it would clear the trains upon each by 1 foot and 7 inches. The space between these tracks where the truck was placed was used by appellant to receive and discharge passengers. The deceased went upon this space for the purpose of meeting his daughter-in-law, whom he expected upon one of appellant's trains, which arrived over the track next to the truck, and next to the one upon which the Rock Island train was standing. He was moving up and down this space, in the near vicinity of the truck, when the expected train arrived. The engine, baggage, and smoking cars cleared the truck, but for some unexplainable cause, other than the inference that it must have been moved by some one, the next, though no wider than those that had passed, did not, but hurled it against deceased, inflicting injuries from which he shortly expired. He was seen to have passed and repassed this truck before the arrival of appellant's train. The truck was noticed by the engineer and fireman of the incoming train, who concluded that their train would clear it. The engineer also

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noticed people in the vicinity of the truck. It was so constructed that it could be easily veered at either end. Upon this state of facts, counsel for appellant contend that no negligence upon its part has been shown, and, even if there was, the accident would not have happened but for the negligence of the deceased.

The first question presented is, was the placing of the truck between the tracks in the limited space provided, and in the immediate vicinity of where the trains of appellant received and discharged passengers, negligence? Although originally so placed that a moving train upon either track next to which it stood would clear it, yet its construction was such that it could be easily veered, when its position would be such that it would come in contact with a moving train. This would result in danger to those within that space, in line with the direction the truck would be impelled by contact with a moving train. From these facts and circumstances, the jury concluded that appellant was guilty of negligence. When the question of negligence is dependent

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upon inferences to be drawn from acts and circumstances of that character that different intelligent minds may honestly reach different conclusions on the question, it is for the jury to determine, under appropriate instructions, whether or not negligence has been established. *Lord v. Refining Co.*, 12 Colo. 390, 21 Pac. 148; 2 *Thomp. Neg.* 1236; *Railroad Co. v. Martin*, 7 Colo. 592, 4 Pac. 1118; *Shear. & R. Neg.* § 11; *Packing Co. v. Vaughn*, 26 Colo. —, 59 Pac. 149. Under this rule, the evidence is clearly sufficient to support the conclusion of the jury that placing the truck between the tracks was negligence on the part of appellant.

The next question presented is whether or not deceased was guilty of negligence, but for which the accident would not have occurred. In this connection counsel for appellant make some suggestions relative to the comparative degrees of care which a carrier is required to exercise as between passengers and those who are not.

Same—Liability.

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We do not believe it is necessary to go into a discussion of this question. Deceased was lawfully at a place provided by appellant for the purpose for which he was there, at the proper time to carry out that purpose; and injuries received by him at this place through the negligence of its employees, while in the exercise of due care and caution upon his part, appellant is responsible for. *Hamilton v. Railway*, 64 Tex. 251; *Pierce, R. R.* 275; *Tobin v. Railroad Co.*, 59 Me. 183; *Railroad Co. v. Mushrush* (Ind. App.), 37 N. E. 954.

It is urged by counsel that, as deceased must have seen the truck, he should have comprehended the situation, realized the danger to which he was exposed, could have avoided it, and, having failed to do so, such failure was contributory negligence upon his part, which caused the accident. When, on the question of contributory negligence, the facts

Same—Contributory Negligence—Question for Jury.

and circumstances are such that different minds may honestly draw different conclusions therefrom on this subject, it is within the province of the jury to determine that question. *Railroad Co. v. Twombly*, 3 Colo. 125; *Lord v. Refining Co.*, *supra*; *Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348; *Tramway Co. v. Reid*, 22 Colo. 349, 45 Pac. 378. While, on the other hand, if the undisputed facts are such that the inference of contributory negligence is the only conclusion which can be logically deduced, the question is one of law, for the court. For the purpose of ascertaining whether or not, on the established facts, deceased was so clearly guilty of negligence that this question is one of law alone, or whether, from the evidence, it was for the jury to determine, as a matter of fact, it is only necessary to refer briefly to the evidence, and the acts of the employees of appellant. If the presence of the truck, in the position it was, should have at once suggested to the mind of an ordinarily prudent person that it was liable to come in contact with the incoming train, then certainly it would have been the duty of the engineer and fireman, who were aware of its location, and who knew that persons were in its

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immediate vicinity, to have taken steps to prevent such a disaster, and their failure to do so would have been wantonly reckless conduct upon their part. When this case was here below (25 Colo. 9, 52 Pac. 211), it was held, upon evidence which is substantially the same as now presented by the record in the case at bar, that an instruction to the effect that, if the jury found from the evidence that deceased was guilty of contributory negligence, appellant was not responsible, unless it appeared that its servants and employees were guilty of reckless conduct, was erroneous, for the reason that the evidence did not justify any such an instruction; there being no evidence tending to prove reckless conduct on the part of such employees. The conclusion deducible from this holding is that the presence of the truck, in the situation it was, did not suggest imminent danger. If this danger was not suggested to the minds of railroad employees whose experience would cause them to anticipate dangers from sources which would not make a similar impression upon the minds of those not versed in the hazards of railroading, it certainly cannot be said, as a matter of law, that deceased should have detected danger which the employees of appellant did not. It is apparent, therefore, from the facts and circumstances, that whether or not the truck, situated as it was, should have suggested to deceased the danger to which he was exposed from that source, is a question upon which different intelligent and honest minds might draw different conclusions, and the question of contributory negligence was therefore properly left to the determination of the jury. The finding that he was not guilty of such negligence is fully supported by the evidence.

Errors are assigned and argued, based upon the giving and refusal of certain instructions. From the views expressed on the two questions of negligence already considered, it is apparent that appellant cannot complain of either the instructions given or refused, and it becomes unnecessary to notice them in detail.

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For the purpose of explaining the presence of the deceased at the place where he received the injury resulting in his death, evidence was admitted, over the objection of appellant, to prove that he had gone there for the purpose of meeting his daughter-in-law, who was expected to arrive from Denver. In the former opinion in this case it was held that a conversation between the deceased and his daughter-in-law, from which it appeared that he had arranged to meet her, was admissible as part of the *res gesta*, to explain his purpose in being at the place where he was injured. That ruling is therefore the law of the case on this subject, and cannot be disturbed; but counsel for appellant contend that the declarations of third persons cannot be received for the purpose of proving this arrangement. From an examination of the evidence, it does not appear that the declarations of third persons were admitted. The witness who testified on this subject only purported to give what he remembered and understood was the conversation which took place between the daughter-in-law and deceased with respect to her request that he should meet her at Colorado Springs on the arrival of a train from Denver, to which he assented.

The final question relates to the amount of damages assessed by the jury. The verdict was in the sum of \$4,000, which appellant contends is excessive. The right of appellees to maintain this action is purely statutory.

It did not exist at common law. The damages which they are entitled to recover must be limited

Death of Parent
—Measure of
Damages.

to those of a compensatory character,—in other words, to such pecuniary damages as they have sustained by reason of the death of their father. As aptly stated by the late JUSTICE ELLIOTT in *Pierce v. Connors*, 20 Colo. 178, 37 Pac. 721: "The true measure of compensatory relief in an action of this kind, under the act of 1877, is a sum equal to the net pecuniary benefit which plaintiff might reasonably have expected to receive from the deceased in case his life had not been ter-

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minated by the wrongful act, neglect, or default of defendant; * * * but it must be borne in mind that the recovery allowable is in no sense a solatium for the grief of the living, occasioned by the death of the relative or friend, however dear. It is only for the pecuniary loss resulting to the living party entitled to sue, resulting from the death of the deceased, that the statute affords compensation. This may seem cold and mercenary, but it is unquestionably the law." At the time of his death his wife was living, and survived him about two years. The appellees were in no manner dependent upon him for support. The mere relationship between them and deceased cannot be made the basis of a recovery in this case, however much they may have grieved over his untimely death. Therefore, as stated in the former opinion in this case, "the pecuniary loss, if any, that resulted to them by reason of the death, was in being deprived of their share of the money that he might accumulate during his expectancy of life." Or, under the evidence, their recovery must be limited to the sum which the father, by his personal exertions, less his necessary personal expenses, and those of his wife during her life, would have added to his estate, and which would have descended to the appellees, as his heirs at law. The court so instructed the jury. Was this instruction followed? At the time of his death, deceased was upward of 68 years of age. His expectancy of life was about $9\frac{1}{2}$ years. There is testimony to the effect that at the time of his death his annual income, arising from his personal exertions, after deducting his personal expenses, equaled the sum of about \$1,000 per annum, although the evidence is not entirely satisfactory upon this point, for the reason that the witness testifying on this subject was not certain that he was fully advised regarding the personal expenditures of the father. The money earned by deceased from this source consisted of a salary of \$1,500 per annum as an employee of a bank, and about \$500 more per annum, earned as a conveyancer and notary, in connection with his bank duties. He had considerable income from investments, but this can-

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not be considered, in estimating his annual savings. We mention this, however, because it appears that his net worth at the time of his death could not have been so very much in excess of the value of his bank stock, which was \$6,400, because it appears that his other investments were incumbered in such an amount that, after deducting interest, there was but little left in the way of income from these sources, after payment of taxes. Had he lived the full term of his expectancy, and during that period been able at all times to continue to engage in the work in which he was employed at the time of his death, his net personal earnings would have exceeded much more than the damages awarded. It cannot be fairly assumed, however, or expected, that, at his advanced age, he would have continued to labor during all the future years of his life. In considering this question, account should be taken of his liability to illness, his incapability of further exertions by reasons of age, and that he might, on account of his years, conclude to retire from active work; that, in all probability, his age would soon incapacitate him from discharging his duties as an employee in the bank, in which he was engaged; that, if he did continue to earn money for a portion of his expectancy of life, he would at least expend a part so earned for personal use during the remaining years. All these are contingencies which must be considered. Necessarily, the ascertainment of damages, dependent upon a variety of circumstances and future contingencies, is difficult of exact computation; but, nevertheless, they cannot be presumed and arbitrarily given. Undoubtedly much latitude must be given a jury in cases of this character, but there must be some basis of facts upon which to predicate a finding of substantial pecuniary loss. *Diebold v. Sharpe* (Ind. App.), 49 N. E. 837. Except for the statute, appellees could not maintain this action. Its provisions are beneficent, but limited. In no case under it can damages exceed the sum of \$5,000. Taking into consideration the evidence upon which the award of damages is based in this case, the contingencies to which we have directed attention,

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the improbability that deceased, during the remaining years of his life, would have saved from net personal earnings a sum anywhere nearly approximating the damages awarded, and the disproportion of that sum to his previous accumulations, it is evident that the jurors certainly failed to consider the instructions of the court on the subject of damages, but must have been influenced by considerations other than those which the law recognizes as elements of damages in such cases. For these reasons, the judgment of the district court is reversed, and the cause remanded for a new trial. Reversed and remanded.

CAMPBELL, C. J., not participating.

SANDERS

v.

CHICAGO, R. I. & P. RY. CO.

(*Supreme Court of Oklahoma, June 30, 1900.*)

Injury to Passenger—Riding on Steps—Contributory Negligence.*
—One is not justified in riding on the steps of a passenger car, outside of the vestibule door, even though he has a ticket for passage on that particular train, and is unable to secure admission to the coach; and if one voluntarily assumes such risk, and is accidentally thrown from the train while it is running, he is not entitled to damages for personal injuries received thereby.

Evidence—Demurrers.—A demurrer to evidence which does not reasonably support the allegations of a petition, and which will not support a verdict, should be sustained.

(Syllabus by the Court.)

ERROR by plaintiff from Kingfisher county district court.
Affirmed.

*See note, 14 Am. & Eng. R. Cas., N. S., 332 *et seq.*; Illinois Cent. R. Co. v. O'Keefe (Ill.), 9 Am. & Eng. R. Cas., N. S., 611 and note, p. 619.

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D. K. Cunningham, for plaintiff in error.

M. A. Low, W. F. Evans, C. O. Blake, and E. E. Blake,
for defendant in error.

BURWELL, J. Spencer E. Sanders commenced this action against the Chicago, Rock Island & Pacific Railway Company to recover the sum of \$20,000, as damages alleged to have been sustained by him on account of personal injuries caused by the negligence of the defendant while plaintiff was a passenger on one of its trains. Issues were joined, and a trial had. After the plaintiff introduced all of his evidence and rested, the defendant filed a demurrer to the evidence, which was sustained by the court, and judgment for costs entered for the defendant. The plaintiff saved his exceptions to this order, as well as to an order denying him a new trial, and brings the case here on error.

Case Stated.

The facts in this case are brief. The plaintiff on the morning of the injury went to the passenger depot of the defendant in Kingfisher, and purchased from the agent a ticket from that place to Dover, which is located a few miles north of Kingfisher. At this time the north-bound passenger train was standing by the depot, having arrived some four minutes before, and other passengers had gotten on and off of it. A lady and gentleman entered the front end of the chair car a short distance ahead of the plaintiff, but when the plaintiff reached the car the vestibule door was closed and locked. He stepped onto the car steps and shook the door, but could not get it open. He then walked back to the other end of the chair car and tried to open the vestibule door there, but could not. According to his statement, he stood on the steps until the bell rang for leaving, and then shook the door again. By this time the train was moving, and he concluded to remain on the steps, thinking that some of the trainmen would discover him and let him in. But the other witnesses say that after trying the vestibule door at the back

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end of the chair car, and finding himself unable to effect an entrance, he stepped down on the depot platform and started toward the north end of the car, and that at this time the bell began ringing and the train started, whereupon he stepped back onto the steps at the back end of the chair car and rode off. This difference, however, we deem immaterial. At the time plaintiff arrived at the train all of the passengers had gotten on and off, and all of the trainmen had returned to the train, or at least none of them were on the depot platform or in sight. The ordinary stop of this train at Kingfisher was five minutes, and this was about the time consumed that morning. Plaintiff rode on the car steps outside of the vestibule door until the train reached a point a short distance north of Dover. Here, without any force by or knowledge of the agents of the defendant, he accidentally fell off of the train, and received the injury complained of.

Viewing this evidence in its most favorable light, the plaintiff is not entitled to recover, and the demurrer was properly sustained. Many authorities are cited by the appellant

Injury to Passenger—Riding on Steps—Contributory Negligence.

to the effect that railway companies are bound to provide proper accommodations and to use all reasonable precautions for the safety of their passengers. The correctness of these decisions is not questioned in this opinion. However, the defendant company had used these precautions. Vestibule doors on cars are for the purpose of preventing passengers going from one car to another while the train is moving from falling off of the train, and to keep out smoke, dust, etc. The defendant knew, or at least, in law, it is presumed that he knew, that it was extremely dangerous for him to ride on the car steps, outside of the vestibule door; and while it is true he had purchased a ticket, possibly to ride on that train, the company did not agree that he might ride on the car steps. His ticket gave him passage in the car, and not on the steps outside, and when he voluntarily elected to ride on the steps he assumed all of the additional risks incident thereto. Persons

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have become familiar with the extreme danger of riding on the tops of cars or on the steps, and the courts have laid down the rule that such acts constitute negligence *per se*. Secor v. Railroad Co. (C. C.), 10 Fed. 15; Scheiber v. Railway Co. (Minn.), 63 N. W. 1034; 4 Elliott, R. R. § 1630, and notes. While certain duties are imposed upon railway companies for the protection and safety of passengers, persons riding on passenger trains are required to use at least reasonable diligence and care for their own safety. If the plaintiff was denied a fair opportunity to get on the train after buying his ticket, provided he bought it in time to take passage on that particular train under the rules of the company, and the train was one from which passengers were permitted to alight at Dover, and he suffered any damages by reason thereof, he could have maintained his action for the same; but he cannot recover damages from the company for an injury which was the result of his own rash act, and which imperiled his life from the very moment the train reached full speed. The evidence of the plaintiff and his witnesses did not reasonably support the allegations of the petition, and if a verdict had been returned for the plaintiff the trial court would have been compelled to set it aside.

Therefore the demurrer to the evidence was ^{Evidence—}~~Demurrers.~~ properly sustained. For the reasons herein expressed, the judgment of the court below is affirmed at the costs of plaintiff in error. All of the justices concurring, except McATEE, J., who presided at the trial below, not sitting.

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BALTIMORE, C. & A. RY. CO.

v.

KIRBY.

(Court of Appeals of Maryland, June 14, 1900.)

Excursion Trains—Right to Go to Station in Carriage Instead of by Intersecting Railroad—Evidence.—As an unqualified privilege had been given to excursionists living in certain towns to return on the express train, and no reference was made in the advertised notice to the mode by which they might reach defendant's station to take the train for the excursion point, they had the right to drive to the station in carriages, instead of going there by an intersecting road; and handbills containing such notice were competent evidence to show that plaintiff, one of such excursionists, had such privilege.

Ejection from Train—Punitive Damages.—Even though plaintiff was wrongfully on such express train, the conduct of the conductor in kicking him from a car step while the car was in motion warranted the awarding of punitive damages against the railroad.

APPEAL by defendant from Dorchester county circuit court. *Affirmed.*

Argued before MCSHERRY, C. J., and BRISCOE, JONES, BOYD, and SCHMUCKER, JJ.

Wm. H. Adkins, P. L. Goldsborough, and Robert P. Graham, for appellant.

J. C. & C. Mullikin, Thos. W. Simmons, Joseph B. Seth, and Geo. W. Wilson, for appellee.

MCSHERRY, C. J. This case is before us for the second time. The first appeal is reported in 88 Md. 409, 41 Atl. 777. There are but two questions brought up by the present record. One of these concerns the admissibility of evidence, and the other relates to the granting of the second prayer of the plaintiff. This second prayer is identical in terms with the fourth prayer, which

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was granted on the former trial, and which was not then objected to by the defendant. There is no complaint as to the structure of the prayer, nor as to the legal principle which it embodies. The sole ground upon which it is insisted that it should have been rejected is that there was no evidence to support one of its hypotheses, and that hypothesis is the one upon which the claim for punitive damages is founded. The suit was brought to recover damages for the forcible ejection of the plaintiff from an express train of the defendant company by the servants of the defendant. A detailed statement of the circumstances which preceded and culminated in the expulsion of the plaintiff need not be given, because neither of the questions which we have to pass on requires it. And these questions do not require it, because, as respects the prayer, the theory upon which it was constructed admits that the defendant's servants had the right to eject the plaintiff, and because, as respects the evidence objected to, it throws light only on the plaintiff's first prayer, the accuracy of which was conceded by the defendant. Indeed, we ought to say that there is comparatively little necessity to discuss the prayer to which objection is made, because precisely the same measure of damages which it prescribed is contained in the plaintiff's third prayer, which was also conceded by the defendant to be right. But we will briefly consider both questions.

An excursion train was run from Claibourn to Ocean City on the 25th day of August, 1897. Persons living in Trappe and Oxford were given the privilege to return from Ocean City on the express train, instead of by the excursion train. On the day named the plaintiff bought an excursion ticket at Easton, and went to Ocean City. In the evening he took the express train to return, and this was the train from which he was ejected. On the first trial of the case it was conceded that he had a right to return on this express train. On the second trial the defendant changed front, and denied that the plaintiff was authorized to ride on the express train. It became necessary, then, for the plaintiff to show that he

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was rightfully on the train from which he was expelled, and he accordingly proved that public notice, by handbills, had been given to the effect that excursionists from Oxford and Trappe could return on the express, which left Ocean City 10 minutes ahead of the excursion train; that he lived at Trappe, and had seen the notice before he purchased his ticket at Easton. Trappe is not on the line of the defendant's road, but is reached by the Delaware & Chesapeake Railroad, which intersects the defendant's road at Easton. As the express train returning from Ocean City reached Easton in advance of the time when the train on the Delaware & Chesapeake passed through Easton to Trappe and Oxford, and as the excursion train did not reach Easton until after the Delaware & Chesapeake train had gone, persons from Trappe and Oxford who went upon the excursion would not have been able to reach home by rail unless they had been allowed to return from Ocean City by the express. But it appeared that plaintiff had not gone from Trappe to Easton by rail, but had driven there in his carriage. The defendant thereupon moved the trial court to strike out the evidence which showed that persons from Trappe and Oxford were entitled to return from Ocean City on the express train, and based the motion on the ground that the plaintiff had driven to Easton, and had not gone there by the Delaware & Chesapeake Railroad. The motion was overruled, and to this action the first exception was taken. As an unqualified privilege had been given to excursionists living in Trappe

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Railroad—
Evidence.

and Oxford to return from Ocean City on the express train, the reason for granting the privilege was wholly immaterial. Whatever the reason may have been, the fact was held out to the public that persons living in Trappe and Oxford, and who might go on that excursion, could return on the express train, and no reference was made in the advertised notice to the mode by which they might reach Easton from Trappe or Oxford. Confessedly, the plaintiff fell within the class of people named in the public notice,

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for he was a resident of Trappe; and it made no difference that he drove to Easton in his carriage, instead of going there by a train on the Delaware & Chesapeake Railroad. Had the public notice advised the excursionists from Trappe and Oxford that only such of them as held tickets over the Delaware & Chesapeake road could return on the express train, a different question would have been presented. The evidence which the court refused to strike out tended to show that the plaintiff was rightfully on the express train, and there was no error committed in permitting the jury to consider it.

The only objection to the granting of the second prayer is that there was no evidence to justify the allowance of punitive damages. Even if we were satisfied that there was no evidence legally sufficient to support a verdict awarding punitive damages, we would find a Election from Train—Punitive Damages. great, if not an insuperable, difficulty in reversing the judgment, because the defendant, by conceding the plaintiff's third prayer, has admitted that there was sufficient evidence before the jury to show that "the plaintiff was treated with unnecessary and reckless violence and indignity," and this would be sufficient to warrant the infliction of such damages. In conceding a prayer, there is involved, of necessity, a concession that there is sufficient evidence to support the hypothesis of the prayer; and, as the third prayer left it to the jury to find whether the plaintiff had been treated with unnecessary and reckless violence and indignity, it must be assumed that the defendant conceded there was evidence which tended to show that fact. How then, after such a concession, can it object to the granting of another prayer, when the sole ground of objection to the latter is that there was no evidence to prove the very thing which the concession admits had been proved? But, passing this by, what is the doctrine on the subject of punitive damages in such a case as this? In the recent case of *Smith v. Railroad Co.*, 87 Md. 48, 38 Atl. 1072, it was considered and discussed; and we need do no more than say that whenever the injury complained of has

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been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. The malice spoken of implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations. This is the rule. Now, there is a conflict of testimony in the record. If the defendant's witnesses were believed by the jury, then no exemplary damages ought to have been given. If, on the other hand, the plaintiff's witnesses were credited, then there was evidence which showed such contumely, force, and indignity as would justify the jury in going beyond the limit of mere compensatory damages. Two witnesses testified that, after the plaintiff had been forcibly put off the car in the open country, the conductor, while standing on the car steps, kicked him in the breast. The car was in motion at the time, having been started by the direction of the conductor. The plaintiff, who was holding to the steps' railing, fell to the ground, and the train passed on. Kicking a man in the breast while he is holding to a moving car, and thereby throwing him violently to the ground, can scarcely be described as other than "criminal indifference to civil obligations." If the conductor was right in putting the plaintiff off, he was authorized to use all necessary force in a proper way to do what he had the right to do, but that authority does not carry with it a liberty to treat the offending individual with the indignity and contumely which are involved in kicking a person loose from a moving train. There was evidence tending to show that this had been done, and it was for the jury to say whether that evidence was true. There was, consequently, evidence which supported the hypothesis of the prayer, and the objection founded on the want of such evidence cannot be sustained. The rulings excepted to being right, the judgment appealed against will be affirmed. Judgment affirmed, with costs above and below.

Milam v. Southern Ry. Co

MILAM

v.

SOUTHERN RY. CO.

(*Supreme Court of South Carolina, July 10, 1900.*)

Injuries to Horses in Transit—Damages—Opinion Evidence.—In an action against a railroad for injuries to horses in transit by reason of defendant's failure to feed and otherwise care for them, the owner, a liveryman, was properly allowed to testify as to whether, because of their injuries, he sold them for less than they were worth.

Same—Evidence.—In such action, the agent of the connecting railroad which received the car load of horses from defendant was properly allowed to testify as to three waybills on which he had receipted for the charges of the defendant itself for feeding the horses at various points on the route; as such agent was also defendant's quasi agent in its collection of charges from plaintiff, and such service was ratified by defendant.

Same—Nonsuit—Evidence.—In such action, it was not error to refuse to allow defendant to introduce in evidence, while one of plaintiff's witnesses was being examined, and before defendant introduced any testimony, a bill of lading, after defendant had admitted that he had signed some writing on the back of said bill of lading, as such admission did not entitle the bill of lading to be admitted; and, even if admitted, the bill of lading was not entitled, at such time, to be considered as the basis of a nonsuit.

Nonsuit.—Only where the plaintiff fails to introduce any competent testimony to support the material allegations of his complaint which sets up his cause or causes of action against the defendant, is a circuit judge authorized to grant a nonsuit.

Instructions.—In such action, it was not reversible error in the circuit judge, in charging as to the liability of carriers of live stock, to fail to call the attention of the jury to any results from the unruly disposition of the stock, or the ordinary concussions incident to the usual management and running of a train; as there was no testimony on these matters, nor any request to charge on these lines.

Same.—The circuit judge charged that defendant was only liable for injuries to the horses occurring while they were in its charge, and

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his general remarks upon the law on this subject did not constitute reversible error.

Injury to Live Stock in Transit—Connecting Carriers—Liability—Burden of Proof.*—If the defendant railroad, as a common carrier, undertook to deliver the horses at their destination, it was only necessary for the shipper, in order to recover, to prove that they were in good condition when delivered to defendant, and were damaged when they arrived at their destination, although a portion of the carriage was necessarily done by connecting carriers.

Same—Same—Same—Instruction.—It was in dispute, whether defendant undertook to transport the horses as a common carrier merely, or under a special contract limiting its liability, therefore, it was proper, in charging as to a shipper's burden of proof under such a special contract, to explain to the jury that this portion of the charge would not be applicable if the railroad undertook to transport the horses as a common carrier merely.

Presumptions—Questions of Fact.—Presumptions of law cease to exist when the facts are proved.

Carriage of Live Stock—Shippers Failure to Care for Stock—Carriers' Duty—Statute.†—Even though the shipper agreed to care for his stock while in transit, if he failed to do so, there could be a recovery in such action, under S. Car. Rev. St. § 1678, if the railroad failed to feed, water and rest the stock at the end of every 28 hours they were on board its cars.

APPEAL by defendant from Newberry county common pleas circuit court. *Affirmed.*

B. L. Abney and Duncan & Sanders, for appellant.

Johnstone & Welch, for respondent.

POPE, J. The plaintiff, by his action, sought to recover \$1,000 damages by reason of the injuries sustained by a lot of 24 horses which were transported by the defendant from

Case Stated. Birmingham, Ala., to Newberry, in the state of

South Carolina. Plaintiff, in his complaint, set up three causes of action: One was based upon the common-law doctrine that the defendant was an insurer of the freight received by it as a common carrier; the second charged the same facts as were set forth in the first cause of

*See note, 14 Am. & Eng. R. Cas., N. S., 212.

†See note at end of case.

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action, except that the defendant was charged with negligence by which injuries to the 24 head of horses resulted; and the third charged wanton negligence. By the answer of the defendant, it admitted that it was a common carrier, but denied all other allegations of the complaint; alleging, in addition thereto, that the plaintiff was responsible for all injuries which resulted to his car load of horses from a failure to feed, water, and rest them as was required by law; that any injuries done the said car load of horses happened upon some other line of railway, in their transportation to Clinton, S. C., than on the defendant railway. The cause came on for trial before JUDGE WATTS and a jury. During said trial the defendant objected to certain testimony offered by plaintiff. Also, it made two motions for nonsuit, both of which were overruled. Also, it made certain requests to charge, which were declined by the circuit judge. Verdict was for plaintiff in the sum of \$300. After judgment thereon, defendant appealed upon the grounds previously indicated, and also upon the ground that the circuit judge erred in some of his charges to the jury.

The first ground of appeal suggests error in the circuit judge in allowing the plaintiff to testify in answer to the questions: "From your experience as a horse dealer, and from your knowledge of the valuation of horses, did you, or did you not, sell your horses at a price less than their real value by reason of these injuries?" "Did you, by reason of these

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injuries, sell your horses for less than they were worth?" The testimony offered here showed that these 24 horses, when taken from the car in which they had been transported from the city of Birmingham, in the state of Alabama, to the village of Clinton, in the state of South Carolina, were scarred, bruised, gaunt, stiff in limbs, with high fever, and that two were down on the floor in the car, and had to be struck with a whip to get them up, and that the day after arrival a handsome gray died, having passed blood before death, and a little later than the next day after arrival two

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other of the horses died. But, soon after arrival,—in a few days,—plaintiff sold some of the horses. The plaintiff was the owner and keeper of a livery and sales stable. Hence the circuit judge allowed him to answer these questions. Before going further, it should be stated that the plaintiff had inspected the horses when he bought them. Therefore he knew how they looked at the date of shipment, how they looked on their arrival at Clinton, and how they looked several days thereafter, when he sold them. We cannot see anything speculative in the testimony in question. It was based upon facts within the knowledge of this witness. In 12 Am. & Eng. Enc. Law (2d Ed.) p. 477, the doctrine is thus stated: "Farmers, dealers in horses, and liverymen, who know the value of horses generally, may testify thereto." See, also, page 460, *Id.*, which says: "On damages, as on other subjects of expert-opinion evidence, the opinions of witnesses must not be speculative or conjectural, but must be based on facts and conditions existing and proved." Who is there who has not been astonished at the accuracy of dealers in stock and hogs in their estimate of the weight of each one of them? It is this accuracy of judgment, derived from the experience of dealers in stock, which gives their opinions as to the value of horses, mules, etc., such great weight. This exception is overruled.

Again, appellant suggests that the circuit judge erred when he allowed Mr. Horton, as the agent of the Newberry & Laurens Railroad, which railroad had received the carload of horses from the defendant at Newberry, to testify as to the three waybills on which he had receipted for the charges of the defendant itself for feeding the horses at Birmingham, Atlanta, Ga., and Hodges Depot, S. C. We believe the defendant withdrew this exception. But, in the abundance of caution, we pass on it; and in doing so we remark that the service of Mr. Horton in collecting these bills entered as waybills was as the quasi agent of said defendant in its collection of charges from the plaintiff, which

Same—Evidence.

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service of Mr. Horton the defendant has ratified. This exception is overruled.

In its second exception the defendant suggests that the circuit judge erred in not allowing it to introduce in evidence, while one of the plaintiff's witnesses was being examined, and before the defendant introduced any testimony, a bill of lading, after the plaintiff had ^{Same—Nonsuit—Evidence.} admitted that he had signed some writing on the back of said bill of lading. When Mr. Milam, the plaintiff, was on the witness stand, the defendant asked him, on cross-examination, if he had not signed such a paper, a copy of which was exhibited to him. The witness replied that he did not know whether he had signed such a paper or not, but he said he would know his signature when he saw it. It was at this point when defendant's counsel proposed to open the commission it had issued to examine some witnesses at Kansas City, state of Missouri; claiming that the original papers, which had been signed by Mr. Milam, and a copy of which he had exhibited to Mr. Milam, would be found attached to the bill of lading. After a while the court allowed the package containing the depositions of witnesses taken in Missouri to be opened, and the papers referred to taken out, while Mr. Milam, as plaintiff's witness, was on the stand; and the counsel for defendant then exhibited the paper, of which the following is a copy, signed by Mr. Milam, to wit:

"Form 45. Kansas City, Fort Scott & Memphis R. R. Live-Stock Contract. Duplicate. Station, Kansas City. Date, Oct. 28, 1896. In consideration of the free transportation granted us by Kansas City, Fort Scott & Memphis Railroad Company, to accompany the live stock described in the within contract, on its road, and to return therefrom, and of the agreements contained in said contract to be performed by said railroad company, we, the persons in charge of said live stock, agree to be bound by all the terms and conditions of said contract which refer to the persons in

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charge of said live stock, especially those in regard to how and where we shall ride, and the risks we assume, contained in the ninth, tenth, and eleventh paragraphs thereof; and, for the same consideration, we further agree that while attending to said live stock, as provided in the third paragraph thereof, we shall be deemed employees of the railroad company, of the rank of brakemen, for the purpose of determining its liability to us, and we assume all risks incident to such employment. R. R. Milam.

"Pass, on freight trains only, R. R. Milam. F. D. Leeds, Agent."

When the witness was shown his signature to the paper copied above, he promptly admitted that it was his signature, and that the free pass to the city of Birmingham, Ala., was given to him. But the witness said that he did not read the paper he had signed, but that he was told, "Sign this, to get your pass." This he signed at Kansas City, Mo. But he swore that he knew nothing of a contract such as the bill of lading; that he never signed it, nor did he authorize any one to sign the same in his name or as his agent. So, when the attorney for the defendant asked the court to admit it in evidence just then, the court declined to do so. This paper, known as a "bill of lading," was subsequently introduced by the defendant, after (by commission) it had examined the railroad authorities and Tough & Son, at Kansas City, Mo. The reason that defendant was so eager to have the paper introduced while plaintiff's witness was on the stand was to enable it to move for a nonsuit at the close of plaintiff's testimony. The circuit judge refused to admit the bill of lading at that time. While the paper admitted by Mr. Milam to have been signed by him was admitted, and this was on the back of the bill of lading itself, this did not entitle the bill of lading itself to be admitted. The bill of lading was not yet proved, if ever it was. So there was no error on the part of the circuit judge. Under *Wallingford v. Railroad Co.*, 26 S. C. 258, 2 S. E. 19, the defendant would have failed to have this bill of lading considered as the basis of a

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nonsuit, it being admitted while plaintiff's witness was on the stand. This exception is overruled, and we see no harm to the defendant, especially as the defendant had the benefit of the admission of this bill of lading afterwards.

The appellant next alleged error in the refusal of the circuit judge to grant a nonsuit: Nonsuit.

"Third. In not granting the motion of the defendant for a nonsuit on the grounds: (1) That as the defendant had delivered the car containing the horses of the plaintiff to the Columbia, Newberry & Laurens Railroad Company, which road had delivered them to the plaintiff at Laurens, the presumption was that any injury that may have occurred to them occurred on the line of the last-named road; (2) because there was no sufficient evidence to go to the jury of any injury done the horses of the defendant while they were in defendant's charge; (3) because there was a total failure of evidence to sustain the allegations of the complaint." (a) The rule of law granting nonsuits is too firmly established by the decisions of the court of last resort in this state to need a restatement, and yet the question is again raised, and we must pass upon it. Whenever the plaintiff fails to introduce any competent testimony to support the material allegations of his complaint which set up his cause or causes of action against the defendant, the circuit judge is authorized to grant a nonsuit. Was it the circuit judge's duty to nonsuit on a presumption of fact, if any other facts were in testimony? We do not think so, for it is the place of the jury, and not that of the judge, to weigh testimony. (b) The testimony of all the witnesses who spoke of the appearance of the horses on their arrival at Clinton, S. C., was emphatic as to the leanness, the lankness, and the gauntness of the horses. There was testimony that the defendant had complied with the law, in having fed the horses every 28 hours, and rested them for 5 hours after they were fed and watered. But it was no part of the duty of the circuit judge to weigh this testimony. That was the province of the jury. After an examination of the testimony, we can.

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not agree with the appellant that there was a total lack of testimony. These exceptions are all overruled.

"Fifth. In charging: 'Now I charge you that if the defendant railroad, here, received the stock as a common carrier, then they become insurers. Whenever a railroad gets a charter and becomes a common carrier for the purpose of transporting freight and passengers, and such matter as that, when they receive any freight as a common carrier they become insurers of the freight, and they thereby agree to deliver in good condition to the parties that it is consigned to. If the railroad here received this property of Milam in Birmingham, Alabama, as common carriers, then they became insurers of that property, and it was their duty to deliver it to Milam in Clinton, South Carolina, in good order; and if it was not in good order, and it was injured while in their possession, then the road would be liable.' It being respectfully submitted that his honor overlooked the following principles or rules of law: (1) That, where a common carrier in the performance of its duties delivers freight to a connecting road for transportation to its destination, it does not insure the safe delivery by such connecting road; (2) that a common carrier does not insure the safe delivery of live stock against the injuries inflicted upon such stock by their own unruly dispositions, or by the ordinary jars or concussions incident to the usual and ordinary managing and running of a train." Not in every case does a railroad, when it delivers property to a connecting road for transportation to its destination, insure the delivery of said property at its destination to the consignee in safety, but sometimes it does, and this must depend on its contract. In *Kyle v. Railroad Co.*, 10 Rich. Law, 382, the court of last resort in this state held that the contract of the carrier required it to bear the responsibility of safe delivery at destination, to the exhoneration, as between the consignee and the common carrier, of the connecting road. There were two points of view as to the contract in the case of *Milam*, the plaintiff, and the Southern Railway Company. One might

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follow from the terms of the bill of lading signed by Tough & Son and the Kansas City, Ft. Scott & Memphis Railroad Company at Kansas City, state of Missouri; and the other was what might be construed by the waybill issued by the Southern Railway Company at Birmingham, together with the circuitous route it adopted in delivering the car load of horses, for it is an undoubted fact that the Southern Railway Company brought this car load of horses to Atlanta, Ga. At that point the nearest way to Clinton, S. C., was by the Georgia & Northern Railroad, by which in at least 12 hours the car load of horses could have been carried from Atlanta, Ga., to Clinton, S. C., whereas in fact the Southern Railway Company carried this car load of horses from Atlanta, Ga., to Greenville, S. C., and then from there to Newberry, S. C., at which latter point the car load of horses were sent to Clinton by the Columbia, Newberry & Laurens Railroad Company. There was no contract evidenced by the bill of lading issued by the Southern Railway Company, with the plaintiff. The waybill was not a contract in itself, and yet it may be taken as a circumstance, along with others, to determine what this contract between the parties actually was. All these are matters for the jury to solve. Inasmuch as the circuit judge, in his charge, left it to the jury to determine defendant's liability, limited by the requirement that the injury to the horses should have occurred while they were in the custody of the Southern Railway Company itself, we can see no harm in the charge of the judge. So, also, we may say that it was not reversible error in the circuit judge to fail to call the attention of the jury to any results from the unruly disposition of the stock, or by the ordinary jars or concussions incident to the usual and ordinary managing and running of a train; for certainly there was no testimony on either of such matters, nor was any request made to the judge for any charge on these lines. The exceptions are overruled.

Instructions.

We will consider the sixth, seventh, and eight exceptions together: "(6) In instructing the jury: 'That, if the stock

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was received by the Southern Railroad as a common carrier, then they became and would be liable for any damage that might be done to the stock. In other words, they would be then required to deliver it to Milam at Clinton, South Carolina, in good order;’ thereby overlooking the principle or rule of law which makes a common carrier an insurer only over its own line. (7) Because his honor, by his charge, erred in instructing the jury that a common carrier of freight was an insurer of freight which it had delivered to a connecting carrier to be transported to its destination, whereas, it is respectfully submitted, a common carrier of freight is not an insurer of freight which in the performance of its duty it delivers to a connecting carrier to be transported to its destination, beyond the line of such common carrier. (8) In leading the jury to think that a common carrier, to which live stock is delivered to be transported over its own line and connecting lines to their destination, becomes an insurer of safe delivery of such stock at their destination, whereas, it is respectfully submitted, a common carrier of live stock does not insure—First, against injuries which are caused by the unruly dispositions of the animals themselves; or, second, against injuries caused by the ordinary jars or concussions in the ordinary management of a train; or, third, against injuries inflicted while in the hands of a connecting line to which the common carrier, in the performance of its duties, had delivered such stock to be transported to their destination.” In justice to the circuit judge, it would be no bad idea to adopt from the argument of Mr. Welch, for the respondent, under the heads of “a” and “b,” respectively, under parallel columns, what the judge said by detached portions, and what he said connectedly, in regard to defendant’s liability as a common carrier.

(a)
Pages 108, 109, middle of folio 431:

“Now, I charge you that, if the defendant railroad here received the stock as a common carrier, then they became insurers. Whenever a railroad gets a

(b)
Page 109, folio 431:
“And if it was not in good order, and it was injured while in their possession, then the road would be liable.”

Page 112, middle of folio 443 to middle of folio 445:

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charter and becomes a common carrier for the purpose of transporting freight and passengers and such matters as that, when they receive any freight as a common carrier they become insurers of that freight, and they agree thereby to deliver it in good condition to the parties whom it is consigned to. If the railroad here received this property of Milam's in Birmingham, Ala., as a common carrier, then they become insurers of that property, and it was their duty to deliver it to Milam, in Clinton, South Carolina, in good order; and if it was not in good order, and it was injured while in their possession, then the road would be liable."

Page 111, folio 440 to middle of folio 441:

"If it was received by the Southern road as a common carrier, then they become insurers, and would be liable for any damage that might be done to the stock,—in other words, would be required to deliver it to Milam, at Clinton, South Carolina, in good order."

Page 113, end of folio 448:

"If you believe that they took it as common carriers at Birmingham, Ala., they were insurers of the goods, and it was their duty to deliver it in good order at its destination at Clinton."

"Now, you will understand that, before the plaintiff can recover here, the jury must be satisfied from a preponderance of the testimony in the case that the injury, if any at all, to the stock, occurred while it was in the possession of the Southern Railway Company. If the stock were all right and in good order when they were delivered at Newberry, here, to Columbia, Newberry & Laurens road, and they were injured while in the possession of the Columbia, Newberry & Laurens road, then the plaintiff could not recover against this defendant. His remedy, if any, then, would be against the Columbia, Newberry & Laurens road. If, however, the testimony satisfies you that the defendant company was negligent; that they were guilty of negligence in not observing due care and due caution in the handling of that stock, or if they failed to feed or water it or rest it as required by law, and the stock was injured by their negligence,—then the defendant here (the railroad) would be liable."

Page 112, folio 445 to folio 448:

"If the testimony satisfies you that the Southern Railway received the stock at Birmingham, Ala., and it was not injured while in their possession, that they complied with the law, and fed and watered and rested the stock as the law requires, and then delivered it to another road here at Newberry in good order, and it afterwards got injured while in the possession of another road, then the plaintiff would not be entitled to recover. In other words, before you can give a verdict for the plaintiff in this case, you have got to be satisfied that there was negligence on the part of the railroad, if they received it under this contract, and that negligence was the cause of the stock being injured, and the injury occurred

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while the stock was in the possession of the Southern Railway, and it was on their account that the injury occurred. Then, if you are satisfied that the railroad was negligent, and the stock was injured while in its possession, then the plaintiff would be entitled to recover whatever damages, in your opinion, he has sustained, under the testimony in the case; that being entirely a matter for you. If this stock was injured after it left the possession of the Southern Railway, the plaintiff would not be entitled to recover. Before the plaintiff can recover here, you must be satisfied that it was injured while in the possession of the Southern Railway, and they were negligent, if you believe there was this contract."

Page 119, requests 16 and 17:

"Even if the evidence shows that the plaintiff's horses were injured when they arrived at Clinton, this fact does not entitle him to damages against the Southern Railway Company, but, before he can recover against it, the jury must be satisfied from the evidence that such injuries were inflicted while the horses were in charge of the Southern Railway Company; and, unless the evidence does satisfy the jury of this fact, then the verdict must be for the defendant.' I charge you that. 'Even if plaintiff's horses were injured when they arrived at Clinton, and it was uncertain whether those injuries occurred on the Southern Railway Company, or Columbia, Newberry & Laurens Railway, then the verdict must be for the defendant.' I charge you that."

Page 125, middle of folio 496:

"As I told you before, before you can hold this railroad responsible, you must be satisfied by a preponderance of the testimony that the injury, if any, occurred while the stock was in their possession."

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As remarked by Mr. Welch in his argument: "Can there be any doubt, therefore, after reading these two parallel sections of his honor's charge, what his meaning was? Column 'a' shows that the isolated portions of the charge may be taken, when considered alone, to hold that a common carrier is liable beyond its terminus. Column 'b' shows that his honor meant to charge nothing like that. He expressly says, again and again, both in his general charge and in charging defendant's requests, that the injury, if any, for which the defendant is held liable, must have occurred on the defendant's road and while in defendant's possession. Now, we confess we do not see how it could be made plainer."

We have thus reproduced what the circuit judge did say, and in what connection he said it. Finding, as we do, that the circuit judge exercised very great care in limiting, by easy and just terms, the liability, if any, of the defendant railroad, we are not inclined to view Same. his remarks, in his charge as complained of, as erroneous. Now, when a circuit judge indulges in some general remarks upon the law, without any possibility of affecting thereby the issues actually on trial before him, we can see no reversible error. Somewhat akin to this is what was said by the late CHIEF JUSTICE SIMPSON in *Wallingford v. Railroad Co.*, 26 S. C. 264, 2 S. E. 21: "Before discussing these exceptions, it would be well to state some of the principles of law applicable to common carriers, about which there is little or no doubt. At common law there is no exemption to the liability of common carriers for goods, etc., intrusted to them, except for an act of God or of the king's enemies. They are regarded as insurers as to all else. In England, however, and in several of the states of this Union, including our own [South Carolina] the common-law doctrine was modified to the extent of allowing a common carrier to exempt himself from this broad liability by special contract as to certain specified causes of injury. See, in this state, *Swindler v.*

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Hilliard, 2 Rich. Law 286; Baker v. Brinson, 9 Rich. Law 202, and other cases that need not be cited. It was, however, held in all these cases: That he could not shield himself from the consequences of negligence by a contract. That his character as a common carrier could not be changed by contract. Only his liability to the extent of the specified exemptions was diminished. In all things else the general doctrine of common carriers applied, and especially as to negligence. And, further, that the onus was upon him to bring himself, by the testimony, within the exemptions mentioned in the contract. [Here follows, in the opinion, a quotation from the case of Swindler v. Hilliard, *supra*.] It was held in that case that common carriers could not by any special contract or agreement exempt themselves from liability for negligence, and that, when a contract was made, the onus of showing, not only that the cause of the loss was within the terms of the exemption, but also that there was no negligence, lies on the carrier." As will be seen by considering the charge, as a whole, the circuit judge was exceedingly careful to limit the liability only for injuries, if any, to the 24 hours while they were in charge of the Southern Railway Company.

The defendant insisted that the contract between the plaintiff and itself was embodied in the bill of lading signed by the Kansas City, Ft. Scott & Memphis Railway Company and Tough & Son. If so, the defendant had to agree to the thirteenth article of said contract, to wit: "* * * It is also agreed that the conditions of this contract shall inure to the benefit of all carriers transporting the live stock shipped hereunder, unless they otherwise stipulate, and that in no case shall one carrier be liable for the negligence of another." So far as the sixth exception is concerned, it must be overruled, for it is clear from an examination of the whole charge that the circuit judge limited the liability of the defendant to its own acts of commission and omission. And so as to the seventh exception; his honor was very careful in his

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charge. And so as to the eighth exception; his honor was, if anything, too lenient in his charge to the defendant. Hear his charge: "'(5) If the jury are satisfied that the bill of lading purporting to have been issued on October 28, 1896, by the Ft. Scott, Kansas City & Memphis Railroad Company to John S. Tough & Sons, in the contract for the transportation of the horses described in the complaint from Kansas City, Missouri, to Clinton, S. C., and that this contract was made under circumstances similar to those stated in request No. 1, then the plaintiff cannot recover for any alleged injuries to said horses by simply proving that said horses were in good order when they were first delivered to the railroad company, or that they were in good order at any intermediate point, and then by proving that they were damaged when they arrived at their destination; but he must go further, and prove that such injuries were not caused by their being weak, unruly, or exhausted from their long journey, or from the cramped and crowded condition of the horses in the car, or from the ordinary jars or concussions incident to the ordinary managing and running of a freight train.' I charge you that." For, notwithstanding all these advantages conceded to the carrier, it may be that some proviso as to negligence by the carrier should have been included in the charge; but no complaint comes to us on this matter, and we only mention it to show that appellant has not been injured by the charge. This exception is overruled.

Next we will consider the ninth ground of appeal, which complains that the judge charged the jury that "if you [the jury] believe they took it [the car load of horses] as common carriers at Birmingham, Alabama, they are insurers of the goods, and it was their duty to deliver it in good order at its destination, in Clinton." The error in this charge is alleged by appellant to be that by this charge his honor caused the jury to believe that a common carrier of live stock is an insurer "(1) against injuries inflicted by the unruly dispositions of the animals themselves; (2) against injuries inflicted by the ordinary jars and concussions caused by the

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ordinary running and managing of a train; (3) against injuries inflicted by a connecting line to which, in the performance of its duty, the first carrier had delivered the stock to be transported to their destination." We have just seen that the circuit judge charges the law as to first subdivision as requested by appellant, and so, also, as to the second subdivision; and, so far as the third subdivision is concerned, the charge of the judge is its own vindication, as to the error here suggested. This exception is overruled.

We will next consider the tenth exception: "(10) In instructing the jury that defendant's fifth request, to wit: 'If the jury are satisfied that the bill of lading purporting to have been issued on October 28, 1896, by the Ft. Scott, Kansas City & Memphis Railroad Company to John S. Tough & Sons is the contract for the transportation of the horses described in

Injury to Live
Stock in Transit—
Connecting Car-
riers—Liability—
Burden of Proof.

the complaint from Kansas City, Missouri, to Clinton, S. C., and that this contract was made under circumstances similar to those stated in request No. 1, then the plaintiff cannot recover for any alleged injuries to said horses by simply proving that said horses were in good condition when they were first delivered to the railroad company, or that they were in good order at any intermediate point, and then proving that they were damaged when they arrived at their destination; but he must go further, and prove that such injuries were not caused by their being weak, unruly, or exhausted from their long journey, or from the cramped and crowded condition of the horses in the car, or from the ordinary jars or concussions incident to the ordinary managing and running of a freight train,'—was only applicable to this case provided the stock were shipped under the contract as expressed in the bill of lading, and that it was not applicable if the defendant received the stock as a common carrier, whereas it is respectfully submitted that the request was applicable even though the defendant did receive such horses as a common carrier." There was a contest betwixt the parties litigant as to what contract governed the defendant in the performance of its duty as a

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common carrier, to wit, whether under the common-law liability, without any special exemption limiting this liability, which, of course, would follow a contract under the common law for the transportation of the 24 head of stock from Birmingham, Ala., to Clinton, S. C., by the Southern Railway Company itself, or whether the contract of the Ft. Scott, Kansas City & Memphis Railroad Company governed. This being the contest here, it would have been improper for the circuit judge to have made the charge as requested, without adding his own closing words, if our statute (section 1720, Rev. St.) applies to the case at bar; and we may remark that we have some serious doubts as to whether the defendant has brought itself under the protection of that section, for this reason: That section says that the initial road shall continue liable for the articles received by it for shipment, unless it is able to produce a receipt in writing from a connecting road for the articles or article so shipped. Now, is the Southern Railway Company the initial road, and has it produced a receipt in writing from a connecting road for the articles so shipped? The articles shipped were 24 horses. Has the Southern Railway Company produced a receipt in writing therefor? Here is the paper they produce: [See next page.]

~~Same-Same-~~
~~Same-Instructions.~~

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SOUTHERN RAILWAY CO., 3d DIVISION.
DAILY REPORT OF ALL CARSReceived from and Delivered to C., N. & L. R. R. at Newberry, S. C., Station,
Enter Home Cars First.

During the 24 Hours Ending 12 Midnight, Nov. 4th, 1896.

RECEIVED FROM						DELIVERED TO							
Hour Received	Initial of Road	No.	*	Kind.	L or E	Destina- tion.	Hour Delivered	Initial to Road	No.	*	Kind.	L or E	Destina- tion.
	No	Cars					1 11:40	Sou.	3488		B.	L.	Laurens.
							2 a. m.	S. W.	1768		S.	L.	Clinton.
							3						
							4						
							5						

I certify that the above is a correct list of cars
received this day. J. A. BURTON, Agent H.Received the above cars from Southern Rail-
way Co. E. CAVANAUGH, Agent W.

Designate class of cars as follows: B, for Box; S, for Stock; F, for Flat; G, for Gondola; and C, for Coal.

*This space for sup't car service.

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Now, remembering that the section 1720 requires a receipt in writing for the article or articles, it may be asked where in the paper tendered by the defendant is there any receipt in writing for 24 horses? We see the letters "S," "L," which are interpreted to mean "Stock," "Loaded," yet no character to show the stock shipped, or number thereof, here appears. Besides, the very headlines say, "Daily Report of All Cars," and the receipt is "for the *above cars*." (Italics ours.) Might it not be stated that the very aim of this section of our law was to fasten upon some common carrier the receipt of the specific article or articles shipped, by the production of a receipt in writing of such article or articles? But, be this as it may, we find no error in this tenth exception pointed out and it is overruled.

We will next consider the 11th exception: "(11) In refusing to charge the defendant's request to charge, to wit, 'Where horses have been transported by successive carriers, and the proof only shows that they were in good order when first delivered, and were damaged when they reached their destination, then the law presumes that such damage was caused while such horses were in the hands of the last railroad company,' and in instructing the jury that 'the whole matter is a question of fact for you. As I told you before, before you can hold this railroad liable you must be satisfied by a preponderance of the testimony that the injury, if any, occurred while the stock was in their possession, and on account of their negligence, provided you conclude they are shipped under a special contract.' The error being, as it is respectfully submitted, in instructing the jury: First. That this is a question of fact for them, whereas, it is respectfully submitted, it was a question of law for the court to instruct the jury what is or is not a presumption of law. Second. That, before the defendant could be held liable, they must be satisfied by the preponderance of the evidence that the injury, if any, occurred while the stock was in possession of the defendant, and

Presumptions—
Questions of
Fact.

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on account of its negligence, provided the stock was shipped under a special contract; thus overlooking the principle or rule of law which requires the plaintiff to prove by the preponderance of the evidence that any injuries which might have been inflicted upon the horses were caused by the negligence of the defendant, whether it receives the stock under special contract or as a common carrier." As to the first subdivision, we might ask what are juries provided for, unless it is to try questions of fact? It seems to us that whenever direct evidence of witnesses is introduced, bearing upon a disputed question of fact, presumptions, like the Arabs, "fold their tents and steal away." As to the second subdivision, we think the circuit judge in his charge has more than done his duty to the defendant on this line of thought. This exception is overruled. "(12) In refusing defendant's eleventh request to charge; it being respectfully submitted that such request embodied a sound rule of law, which is directly applicable to this case." Here is the eleventh request, and what the circuit judge said thereon: "'(11) Where horses have been transported by successive carriers, and the proof only shows that they were in good order when first delivered, and were damaged when they reached their destination, then the law presumes that such damage was caused while such horses were in the hands of the last railroad company.' I refuse to charge you that. The whole matter is a question of fact before you. As I told you before, before you can hold this road liable you must be satisfied by the preponderance of the evidence that the injury, if any, occurred while the stock was in their possession, and on account of their negligence, provided you conclude they are shipped under a special contract." The circuit judge was right. Presumptions cease when facts are proved. It was a matter for the jury. Let the exception be overruled.

"(13) In refusing to charge the defendant's second request to wit: 'If the jury are satisfied that the bill of lading purporting to have been issued on October 28, 1896, by

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the Ft. Scott, Kansas City & Memphis Railroad Company to John S. Tough & Sons is the contract made, as above stated, for the transportation from Kansas City to Clinton, S. C., of the horses described in the complaint, then it was the duty of Tough & Sons, at their own risk and expense, to take care of, feed and water, and attend to said stock while the same were in the stock yards of the said railroad company awaiting shipment, and while they were being loaded, transported, unloaded, and reloaded, and to unload and reload the same at feeding and transfer points, and wherever the same might have been unloaded and reloaded for any purpose whatever; and the plaintiff cannot recover any damages from defendant in this case without proving to the satisfaction of the jury—First, that the horses in question were injured while in the possession of the defendant; secondly, by proving that the injuries were not caused by the negligence of John Tough & Sons to take care of said horses as they had contracted to do. In other words, under such circumstances, if they exist, the plaintiff cannot recover any damages of the defendant simply by proving that the horses were in good order in Kansas City, before they were delivered to defendant, and then by proving that they were damaged when they were received at Clinton, S. C.; but, before he could recover, he must go further, and prove that these injuries were not attributable to the negligence on the part of Tough & Sons to take care of said horses as they had contracted to do.' It being respectfully submitted that the defendant had the right to have this request charged, because—First, it was applicable on the question of contributory negligence on the part of plaintiff or of his agent; and, second, if the bill of lading was the contract, then the burden of proving that the stock were not injured by the negligence of the plaintiff or his agent was, by the contract, upon the plaintiff, and the defendant was entitled to have the jury properly instructed as to the force and effect of such contract." This exception raises practically

Carriage of Live
Stock—Shipper's
Failure to Care
for Stock—
Carrier's Duty—
Statute.

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two questions : (1) The request to charge was proper, because it was applicable to the question of contributory negligence. In *Comer v. Railroad Co.*, 52 S. C. 51, 29 S. E. 637, this court held that even if a plaintiff fails to feed, water, and rest his stock at the end of every 28 hours such stock is in a car for transportation, and during transportation, it is the duty, under the law, of the railroad company in charge of the same to so feed, water, and rest stock on board its cars. (2) The next question is that by the bill of lading signed in Kansas City, Mo., it devolved upon the plaintiff to point out by his proof that the 24 horses were not injured by his acts. The judge's charge clearly limits the liability of the defendant to such injuries as it inflicted. This exception is overruled.

"(14) Because, in refusing the defendant's third request to charge, to wit : 'Where one ships live stock over a railroad, and contracts to go along and take care of said stock while it is being transported, loaded, unloaded, and fed and watered, then, under such contract, it is the duty of such person to perform his part ; and if he neglects to do so, and injuries occur to said stock on account of such negligence, the railroad company cannot be held liable for any damages occasioned thereby,'—his honor did not instruct the jury as to the force and effect of the bill of lading, and as to its bearing upon the contributory negligence of the plaintiff." The case of *Comer v. Railroad Co.*, *supra*, disposes of this ground of appeal. It is dismissed.

"(15) Because the charge of his honor was calculated to mislead the jury and cause them to think, under the law, (1) that a railroad company could not by special contract shift the burden of proof from itself to a plaintiff, so as to make such plaintiff, who had bound himself by special contract, to go along and take care of live stock ; (2) that it was plaintiff who did take upon himself the burden of showing that any injuries which were inflicted upon such stock while *en route* were not caused by his own negligence failing to comply with such contract ; (3) that a railroad company, which, as a common carrier, received live stock to be transported to a

Note

point beyond its line, was an insurer against any damage which might be inflicted on said stock by the unruly dispositions of said stock, or by the ordinary jars and concussions incident to the ordinary running and management of a train, or through the negligence of a connecting line to which railroad company had, in the performance of its duty, delivered such stock for transportation to their destination." We have reproduced, in effect, the last exception of the defendant. We must say that in the light of the decision of the court in *Comer v. Railroad Co.*, *supra*, the defendant is quite persistent in making the same question which was passed upon in that case. The positive testimony of the plaintiff was that no ticket was furnished him upon the trains of the Southern Railway Company. But why should we refer to testimony that is for the jury? As to the third subdivision, the circuit judge has left us no ground to criticise his charge. It covered the case admirably well. This exception is overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

NOTE.

Carriage of Live Stock—Feeding and Watering Stock—Special Contracts.—See *Burns v. Chicago, M. & St. P. Ry. Co.* (Wis.), 17 Am. & Eng. R. Cas., N. S., 290 and *foot-note*.

A provision in a contract for the shipment of live stock, providing that the shipper shall accompany the stock and feed and care for them at his own risk, does not relieve the carrier from the duty of providing water for the stock at suitable points along the line, so that the owner can give it to the stock. *Wabash, St. L. & P. R. Co. v. Pratt*, 15 Ill. App. 177.

A provision in a contract for shipment of live stock, providing that the owner was to feed and water the stock, and that the company should afford reasonable facilities for doing so, does not relieve the company from the duty of feeding and watering, where the animals are carried beyond their place of destination and there detained several days before they are returned. *Bryant v. Southwestern R. Co.*, 6 Am. & Eng. R. Cas. 388, 68 Ga. 805.

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A requirement by a railroad company that the shipper of live stock shall accompany such stock and provide for it at his own risk and expense, as a condition to receiving such stock as freight, is unreasonable; and defendant, in an action for the loss of such stock, cannot prove such custom in order to avoid liability for failure to so provide and care for the stock. *Missouri Pac. R. Co. v. Fagan*, 35 Am. & Eng. R. Cas. 666, 72 Tex. 127, 9 S. W. Rep. 749, 2 L. R. A. 75.

Where live stock are shipped under a contract that the shipper shall feed and water them while *en route* the carrier cannot avoid liability for a failure to properly feed and water, without showing that it offered the shipper reasonable facilities for doing so; neither will the shipper's failure to notify the carrier of his wish and readiness to feed and water affect the carrier's liability. *Taylor, B. & H. R. Co. v. Montgomery*, 4 Tex. App. (Civ. Cas.) 401, 16 S. W. Rep. 178.

Whenever it may become necessary to unload live stock during transit for the purpose of watering or feeding, it is the duty of the carrier to have the proper facilities for unloading. *Dunn v. Hannibal & St. J. R. Co.*, 68 Mo. 268.

ILLINOIS CENT. R. CO.

v.

SOUTHERN SEATING & CABINET CO.

(*Supreme Court of Tennessee, May 31, 1900.*)

Delay in Carriage of Goods to Conditional Purchaser—Knowledge of Carrier—Measure of Damages.*—If property is sold at an advantageous price before shipment, on condition that it be delivered within a certain time, and the carrier, with knowledge of that fact, undertakes its transportation, and through negligence fails to make the delivery in time, and the conditional purchaser declines to receive the property on account of the delay, the liability of the carrier is measured by the difference between the market value of the property when it arrived at the place of destination and the price at which it was conditionally sold before shipment.

Penalty Contracts—Validity.—If a contract is for a matter of

*See *Swift River Co. v. Fitchburg R. Co.* (Mass.), 8 Am. & Eng. R. Cas., N. S., 512 and *note*, p. 514 *et seq.*

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uncertain value, and a reasonable sum is fixed by the parties as the amount to be paid on breach, that sum, though actually called a "penalty" in the instrument, is recoverable as liquidated damages if the obligation be not in fact performed.

Limiting Liability—Negligence.—The fact that the initial carrier limited liability for loss or damage to that line on which it should occur was of no avail, as the injury complained of resulted from the negligent misdirection in the waybill made out by the initial carrier before the goods were started upon their journey.

Damages—Interest.—Under the laws of Tennessee, it is not proper to allow interest on damages recovered.

On Motion to Modify.—Had the defendant railroad company acquiesced in the recovery of the damages found, and limited its appeal in error to the item of interest alone it would have been entitled to have had the costs of the appeal adjudged against the plaintiff, but having brought the whole case up, and been unsuccessful as to everything except the small item of interest, the other party was successful, and, therefore, was entitled to recover costs.

APPEAL by defendant from Madison county circuit court.
Affirmed.

C. G. Bond, for appellant.

Hays & Biggs, for appellee.

CALDWELL, J. This is an action of damages by a shipper against a common carrier. On the 26th of February, 1898, the Southern Seating & Cabinet Company, of Jackson, Tenn., entered into a contract with W. A. R. Goodwin, Case Stated. rector, to manufacture and put up certain pews in St. John's Episcopal Church, at Petersburg, Va., for the sum of \$524. The contract contained a provision that the company "shall forfeit \$10.00 per day for every day it fails to have pews in place after May 6th, 1898," but that provision was subsequently so changed as to waive the forfeiture if the pews should arrive at Petersburg by the 3d day of the month. The pews were manufactured, and by the contracting company delivered to the Illinois Central Railroad Company, at Jackson, Tenn., on the 20th of April, 1898, for shipment to the purchaser, at Petersburg, Va. The representative of the manufacturing and selling company at the time of

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delivering the pews for transportation said to the railway agent: "I wish you would forward this car as quick as you can. This is a penalty contract." The railway agent expressed assent to the request, and promptly executed a bill of lading, properly stating the name of the consignee and the destination of the pews. Nevertheless the car remained in Jackson two days after the issuance of the bill of lading, and, when it left, the waybill, through some inexcusable mistake of the railway agent, called for Parkersburg, W. Va., as the destination of the pews. The car reached the latter point on the 27th of April, and there remained until the 13th of May, when by direction of the defaulting carrier it was started to Petersburg, Va., its true destination, where it arrived on the 21st of May,—24 days later than it would probably have arrived but for the misdirection in the waybill, and 18 days after the contract limit for arrival of the pews had expired. The purchaser accepted the pews, but in doing so required a deduction of \$180 from the contract price, and paid only the balance of \$344. He says he deducted that sum not upon the mere ground that he had the right to do so under the forfeiture clause of the contract, but because he considered it "just compensation" for the inconvenience and expense resulting from the delay, and for the damage done to the pews "in the transportation, and that he would not have received the pews in their damaged condition, and after he had suffered the inconvenience and expense of the delay, without that deduction from the contract price. In December, 1898, the Southern Seating & Cabinet Company commenced this action against the Illinois Central Railroad Company before a justice of the peace, whose warrant stated the nature and ground of suit as follows: "For damages caused by the delay in shipping and delivering certain goods consigned by the plaintiff to W. A. R. Goodwin, Petersburg, Va., April 20, 1898, on account of which delay the said goods were damaged, and the plaintiff damaged in the sum of \$180, forfeited by it under its contract for the delivery of said goods, of which the defendant had notice." The justice of

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the peace pronounced judgment in favor of the plaintiff, and the defendant appealed to the circuit court, where verdict and judgment were rendered for the plaintiff for \$180, with interest. From the latter judgment the railway company has appealed in error to this court, and here assigned several objections to the proceedings below, on account of which a reversal and new trial are sought.

In the course of his charge, the trial judge instructed the jury as follows: "If the goods were shipped, and it was the fault of the railroad company in making a misdirection or misshipment that caused the delay after the 3d day of May, 1898, and if the plaintiff in this case, through its agents and representatives, notified Mr. Reavvis or Col. Dinkins, or both of them, and they were representatives of the railroad company in receiving and shipping the goods, that it was a forfeit contract,—that it was a penalty contract,—and they received it with the knowledge that there was a penalty attached to the contract, then it would have been the duty of the railroad company to have shipped the goods; and if it accepted them that way, and was guilty of negligence in not getting them to Petersburg in the time stated in the contract, and it had ample time to have done so, then it would be liable for the damages the plaintiff has sustained because of the penalty contained in the contract. Now, the burden of proof is upon the plaintiff to show that the railroad employees did receive the goods for the purpose of shipping them, had notice of the penalty, and it was a penalty contract. If it did have notice of the penalty contract, and the goods were accepted by it to be shipped, and it was the fault of the railroad company that they were not delivered by that date, to wit, the 3d day of May, 1898, the railroad company would be responsible for the penalty of the contract, for the time the goods were not delivered, if the delay was caused by the fault of the railroad company." The first assignment of error is directed against that instruction; the point of objection being that it makes the loss sustained by the plaintiff under the penalty clause of its contract with Goodwin, and not the actual

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injury and depreciation of the pews by the delay, the measure of the defendant's liability. Compensation is the primary principle underlying the law of damages; and, where one of two contracting parties breaches his obligation, he is ordinarily liable to the other party, according to the nature and purpose of the contract, for all loss suffered by him as the natural consequence of the breach. In the case of *Hadley v. Baxendale*, 9 Exch. 341, where a carrier was sued in damages for negligent delay in the transportation of a mill shaft, the court, referring to the rule for the admeasurement of damages, said: "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach should be either such as may fairly and reasonably be considered as arising naturally (*i. e.* according to the usual course of things) from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and, in the great multitude of cases, not by any special circumstances, from such a breach of contract." This rule has been adopted in cases too numerous to mention at this time. Some of them are collated in 2 Keener, pp. 1094-1096. It was quoted approvingly by this court in *McDonald v. Timber Co.*, 88 Tenn. 43, 12 S. W. 420. Where property is shipped to market for general sale to such purchasers as may be

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obtained, and the carrier unreasonably and negligently delays the transportation, the measure of damages for that default is the depreciation in salable quality and market value of the property at the place of destination between the time when it should have arrived and when it did in fact arrive. *Railroad Co. v. Hale*, 85 Tenn. 69, 1 S. W. 620; *Hutch. Carr.* § 771; 3 Wood, Ry. Law 1607. But, if the property is sold at an advantageous price before shipment, on condition that it be delivered within a certain time, and the carrier, with knowledge of that fact, undertakes the transportation, and through negligence fails to make the delivery in time, and the conditional purchaser declines

Delay in Carriage of Goods to Conditional Purchaser—Knowledge of Carrier—Measure of Damages.

to receive the property on account of the delay, the liability of the carrier is measured by the difference between the market value of the property when it arrived at the place of destination and the price at which it was conditionally sold before shipment. *Deming v. Railway Co.*, 48 N. H. 455, 2 Am. Rep. 267; *Hutch. Carr.* § 772. The difference between the modes of measuring the carrier's liability in the two cases is due to the difference between its obligations and the consequences of their breach. In the former case the obligation is general, and the loss and liability are general, while in the latter case the obligation is special, and the loss and liability are special. Referring to the carrier's responsibility for the breach of a special contract by delay, a distinguished author has said: "But if the intended use and application of the goods to be carried were expressly brought to the notice of the company's servants at the time they received them, or could be reasonably inferred from circumstances known to them, so that the special use or application might be fairly considered to be within the contemplation of the both parties to the contract, the consignor is entitled to recover the damages naturally resulting from his so being unable to use or apply the goods, since both parties may be said to have made this the basis of the contract." 3 Wood, Ry. Law 1607.

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The contract, breached by the defendant, now before the court, was undoubtedly a special one. The pews in question were manufactured after a peculiar design, for a particular church, under a particular contract, of which the defendant was distinctly notified at the time it accepted them for carriage. The contract of carriage being special, the liability for its nonobservance was likewise special, and the plaintiff was entitled to recover all damages naturally resulting from the breach, whatever the amount may have been. The trial judge, in that portion of the charge heretofore quoted, instructed the jury, in substance, that the proper measure of the plaintiff's recovery, if any should be allowed, would be the penalty of its contract with the consignee for the period the pews were delayed beyond the time therein stipulated as the required date of delivery, which, the record shows, amounted to \$180, the sum actually deducted by the consignee from the purchase price of the pews. That was certainly the amount of the plaintiff's real loss, and, in view of the notice given at the time of the shipment, it may fairly and reasonably be assumed to be the exact extent of the injury which the plaintiff and the defendant contemplated as the natural result of so long a delay in the delivery of the pews, and therefore the true measure of damages recoverable for the breach. In opposition to this view, it might be said with force and plausibility that what is denominated the "penalty clause" of the plaintiff's contract of sale was against public policy, and therefore not enforceable, and that for that reason the carrier, though fully informed of that feature of the contract, would not be legally responsible for the deduction made and permitted thereunder; but that suggestion, if made, could not prevail in the end, for while contractual penalties, as such, are now rarely enforceable either in law or equity, provisions like that in this contract, whatever called by the parties, when deemed reasonable, as this one must be, are by the courts treated and enforced as stipulations for liquidated damages. If the

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contract is for a matter of uncertain value, and a reasonable sum is fixed by the parties as the amount to be paid on breach, that sum, though actually called a "penalty" in the instrument, is recoverable as liquidated damages if the obligation be not in fact performed. Clark, Cont. 600, 601; 1 Pom. Eq. Jur. § 440; Manufacturing Co. v. James, 91 Tenn. 154, 18 S. W. 262; Kemble v. Farren, 6 Bing. 147; Jacquith v. Hudson, 5 Mich. 123; King Iron-Bridge & Mfg. Co. v. City of St. Louis (C. C.), 10 L. R. A. 826 *et seq.*, note (s. c. 43 Fed. 768); 3 Pars. Cont. 156, 157. It is not uncommon, in building contracts, to which class this one belongs, for the contractor to bind himself to pay a stipulated daily or weekly sum for delay beyond the time appointed for completion; and such sum, when reasonable (that is, not excessive), is generally, if not universally, held to be recoverable as liquidated damages, if there be a breach. 2 Keener, Cont. 1096, 1102; Clark, Cont. 600, note; Williams v. Vance, 30 Am. Rep. 31, 32, 35, note. The enforcement of such a rule against the carrier with full notice cannot operate as a hardship upon him, because the sum stipulated by the consignor and consignee must be reasonable, to be enforceable between them; and, for the same reason, it must be so before it can be made the measure of responsibility on the part of the carrier. If it be unreasonable or excessive, the stipulation, however named, is a penalty, and only actual damages, to be ascertained in the ordinary way, can be recovered. "According to the better opinion, the parties, even if they intended to fix upon the amount stipulated as liquidated damages, will nevertheless be limited to the recovery of actual damages, if the amount stipulated for is so greatly in excess of the actual damages that it is in effect a penalty." Clark, Cont. 601; 2 Story, Eq. Jur. § 1318; Baird v. Tolliver, 6 Humph. 187; 3 Pars. Cont. 157, 161; Wood, Mayne, Dam. 203, note.

The Illinois Central Railroad Company, as initial carrier, issued a through bill of lading for the pews, and routed them

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over its own line to Louisville, Ky., and thence to the Chesapeake, Ohio & Southern Railway Company, as ultimate carrier.

Limiting Liability—Negligence.

Va. In the bill of lading it was provided that the carrier was not liable for loss or damage to that line on which the goods were shipped, but that limitation, though valid in law (see *Co., 99 Tenn. 719, 42 S. W. 451*), is of no avail because the injury complained of unquestionably resulted from the negligent misdirection in the way of the initial carrier before the goods were shipped on their journey. The ultimate carrier delivered the goods at the destination for which they were billed in accordance with the terms of the contract between the carrier and the consignee; but that was not the true destination contemplated by a compliance with the shipping contract. The court suggested in argument, and as implied from the facts and conditions requested by the initial carrier and received by the judge, that the ultimate carrier received notice of the misdirection in time to have sent the goods from Petersburg, W. Va., to Petersburg, Va., sooner than it did, and that to have prevented some of the loss to the plaintiff. If that were established as a fact, it would, in equity, create a joint liability upon the ultimate carrier, and would lessen the liability of the initial carrier for its negligence. No limitation can be held to be relieving a carrier from responsibility for its negligence. *Bird v. Railroad Co., 99 Tenn. 721, 42 S. W. 451*, and other citations.

The court below peremptorily instructed the jury to allow interest on whatever amount the plaintiff was found entitled to recover as damages, and to include accordingly in its verdict the interest. This instruction was

Damages—Interest.

The plaintiff's demand was for the letter or the spirit of the statute (§ 3494) enumerating the debts that become due by matter of law. Indeed, it was not for

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for damages. None of the other assignments of well taken. Plaintiff may remit the \$14.31, and affirmance as to the balance of the judgment; other- reversal will be entered.

On Motion to Modify.

ing the alternative suggested in the opinion delivered se on a former day of the term, the Southern Seat- binet Company remitted the item of \$14.31 interest, an affirmance as to \$180, the amount es found below. The entry thereof, On Motion to Modify. the minutes of the court, concludes adjudication of all costs against the railroad ; and the railroad company now asks the court to at entry, and adjudge the costs of the appeal in inst the Southern Seating & Cabinet Company. fication is asked upon the ground that "an appeal ssary to get rid" of the effect of the erroneous n on the subject of interest. Had the railroad acquiesced in the recovery for \$180 damages, and s appeal in error to the item of interest alone, it doubtably be entitled to the modification sought, for ent it would have been the successful party, in the nse; but, having brought the whole case up, and successful as to everything except the small item of and that item being eliminated by release, the other successful, and, being so, is entitled to recover costs. re a suit in chancery, the court might, in its discre- dge a part of the costs against each party, on the at the recovery below has been decreased here. rse, however, though often pursued in equity causes, owable in a law case, like that now before the court. on to modify is overruled.

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ST. LOUIS, I. M. & S. RY. CO.

v.

LAW.

(Supreme Court of Arkansas, May 19, 1900.)

Carriage of Live Stock—Delay in Furnishing Cars—Escape from Stock Pen—Contributory Negligence—Liability.*—Owing to the defendant railroad's failure to furnish cars according to the promise of its agent, plaintiff was compelled to put his cattle in defendant's stock pen, the gate of which sagged so that it could not be latched without being lifted. The escape of the cattle from the pen was due to plaintiff's failure to lift the gate in order to latch it. And he had not called upon defendant to assist him in placing or securing them in the pen. *Held*, that the escape of the cattle was due to plaintiff's carelessness, and there could be no recovery for loss resulting from their escape.

Same—Same—Damages—Evidence.†—Damages for the depreciation in value of cattle by reason of delay in furnishing cars cannot be recovered, where the only evidence of the amount of the loss is the plaintiff's estimate unsupported by a sufficient statement of facts to enable the jury to determine the damages.

Same—Limiting Liability—Notice of Claim.‡—Where the notice of claims for loss or injury to cattle in transit required by the contract as a condition precedent to recovery is confined to "any damages, or any loss or injury to live stock covered" by the bill of lading, such limitation cannot apply if the loss or injury is not covered by the bill of lading.

APPEAL by defendant from Drew county circuit court.
Reversed.

Dodge & Johnson, for appellant.

R. E. Craig, W. S. T. Fanar, L. McCain, and Wells & Williamson, for appellee.

*See note at end of case.

†See *St. Louis, etc., Ry. Co. v. Edwards* (C. C. A.), 8 Am. & Eng. R. Cas., N. S., 402 and notes, p. 411 *et seq.*

‡See, generally, note, 6 Am. & Eng. R. Cas., N. S., 632 *et seq.*

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BATTLE, J. John C. Law sued the St. Louis, Iron Mountain & Southern Railway Company for damages which were caused by the escape of his cattle from the stock pens of the defendant, in which they had been placed for shipment, and by the failure to ship them within a reasonable time after they were ready and waiting for transportation. He alleged in his complaint that he notified the defendant's agent that he would have 340 head of cattle at Portland, on the line of its railway, in this state, on the 23d of November, 1897, ready for shipment, and that he was informed that the cars would be ready to receive them on the 24th of the same month; that he arrived at Portland with his cattle on the 23d of November, and placed a part of them in the defendant's stock pen; that on the night following the cattle in the pen broke through a defective gate and made their escape; that 112 of them were recovered, at an expense of \$71.10 to him; and that 28 could not be found, and were lost. He further alleged that the cattle were detained at Portland needlessly and negligently from the 23d to the 25th of November, when they were shipped; that while the 112 were in the stock pens they were not fed or watered, but were "starved" by the defendant for a period of 60 hours; that they became emaciated, hungry, and restless, to the plaintiff's damage in the sum of \$336; that the 28 which were lost were worth \$700; that he was further damaged in the sum of \$309 by reason of the defendant's failure to ship the remaining 206 head in a reasonable time, and to water and feed them while awaiting shipment. And he asked for judgment for \$1,416.10, the total amount of his damage. The defendant answered, and denied each allegation in the complaint, and set up many defenses. The jury in the case, after hearing the evidence, returned a verdict in favor of the plaintiff for \$600. The court rendered judgment accordingly, and the defendant appealed.

The evidence that was adduced in the trial tended to prove, substantially, the following facts: On the 15th or 16th of November, 1897, Law, the plaintiff, applied to the defend-

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ant's agent at Portland for 10 cars, for the purpose of shipping 340 or 350 head of cattle to St. Louis and Little Rock, and the agent promised that he would try to procure the cars for him. Plaintiff then returned to his home, at Hamburg, in this state, where his cattle were. While there he was informed by the agent, through a telegram, that the cars would not be ready until the 23d of November. He drove his cattle to Portland; reaching there on the 23d,—the day designated. On arrival there he placed 4 car loads of them, which he expected to ship to St. Louis, in Cammack's lot, which adjoined the defendant's stock pens. The remainder of the cattle (6 car loads) he herded in an old field about a mile and a half from town. The next day (the 24th of November) the agent informed him that he would get his cattle off about 3 o'clock in the afternoon. He then took the 4 car loads of cattle out of Cammack's lot, and put them in the defendant's stock pens. The gate to the pens was an old one. It sagged down and dragged on the ground. It had settled so (as plaintiff testified) "that you could not fasten it good." It had a sliding latch, which fitted in a notch in a post; and it could be fastened by slipping the latch into the notch, or on the inside of the post. He pushed the gate to, and as it sagged he made no effort to raise it in order to shove the latch into the notch, but slid the latch on the inside of the post. On account of the crowded condition of the pens the latch was subject to be pushed back, and the gate opened, by the cattle rubbing and pressing against it. But he made no effort to prevent this, but slid the latch on the inside of the post, and left it in that condition. On the next succeeding night, about 8 o'clock, the cattle pushed open the gate and escaped. All of the cattle except 25 were recovered, at a cost of \$71.10. Twenty-eight were at first lost, but 3 of them were afterwards found. The 25 which were never recovered were worth \$625.

One hundred and thirty-eight head of the cattle were shipped from Portland on the 25th of November, 1897, and 206 were shipped on the 28th of the same month. While they

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were at Portland, awaiting shipment, the weather was bad, and mud abounded everywhere. They were compelled to stand in the mud. It was difficult to obtain feed for them. A few cotton seed were obtained, but there were no troughs and no place suitable for feeding; and the seed were thrown in piles on the ground, and a good part of them were lost in the mud, and they did but little good. The consequence was, the cattle suffered with hunger and lost much in flesh, and it became necessary to feed them for some time before they were ready for market. The delay in the shipment was caused by the great demand for cars on the defendant's road, which exceeded reasonable anticipation. The defendant was unable to supply the demand of shippers.

The plaintiff claims that he was damaged in the manner aforesaid as follows:

First. He claims he was damaged by reason of loss of 28 head of cattle, caused by their escaping from a defective and insecure pen, \$700.

Second. To amount paid out for gathering up the escaped cattle, \$71.10.

Third. To damages to 112 head of cattle by exposure and detention at Portland and Little Rock, caused by delay in furnishing cars, \$3 per head, \$336.

Fourth. To damages for detention of 206 head from Tuesday, November 23d, to November 28th, without food and water, at \$1.50 per head, \$309.

The jury, in a special verdict, found that he was entitled to damages as follows:

To loss of 25 head...	\$375
To damage to stock and gathering same.....	225
Total.....	\$600

Did the evidence sustain the verdict? The evidence shows that the cattle which made their escape from

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the pen passed through the gate, and that their escape was due entirely to the manner in which the gate was fastened. If there was any defect or insecurity in the manner in which it was fastened, it was the result of plaintiff's negligence. He relieved the defendant of every duty in this respect, and, unaided and alone, except by his own employees, undertook to fasten it. The defendant was not called upon, and did not undertake, to assist in any way. The escape of the cattle was due entirely to the negligence of the plaintiff, and he is consequently entitled to recover nothing on that account.

Was the verdict of the jury sustained by the evidence in other respects? The plaintiff undertook to prove the damages that he sustained by the detention of the cattle at Portland by his own testimony, elicited by questions and answers, over the objection of the defendant, as follows:

"Q. You have charged here damage to 112 head of cattle by reason of neglect in furnishing cars, exposure and detention at Portland and Little Rock, \$3 per head. Tell the jury what was the damage, and what was the cause.

"A. Why, the damage, I considered, was at least \$3 a head; and, I think, more than that.

"Q. What was the damage resulting from delay in furnishing cars at Portland, per head of cattle?

"A. Three dollars a head is what I said just then. I considered they were damaged that much.

"Q. Tell the jury how they were damaged.

"A. They were starved to death in the mud, and detained there, and then, after they got out of the pens, of course, they got nothing to eat there, you see, and they were detained there three or four days without anything to eat; and, of course, that fixed them so they were not fit to go on the market at all, and I had to put them in my feeding pens, and ship them out in the spring as fed cattle. I would have sold them off the range just as they were the first time.

"Q. The next item is the next detention of 206 head of

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tributory Negli-
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cattle from Tuesday, November 23d, until November 28th, at 3 o'clock. Where did the detention occur?

"A. At Portland.

"Q. What was that worth per head?

"A. One dollar and fifty cents per head."

This was all the evidence adduced to show the damage mentioned, and it was clearly incompetent; for it is not, as a general rule, permissible for a witness to estimate the damages a party has sustained by the doing or omitting to do a particular act. That is not a fact, but a matter of opinion, to be deduced from competent evidence by the court or jury trying the issues of fact. The damage in question was the pecuniary injury the plaintiff suffered on account of the unreasonable detention of his cattle at Portland. We do not know what elements entered into his estimate of the same. He might have estimated it to be the depreciation in the market value of the cattle on account of an unreasonable delay in the shipment, or the cost of restoring the cattle to the condition they were before the delay. In the latter case his measure of damages would have been clearly wrong. This is not one of those cases in which there is no room to estimate damages, except in one way. Hence the greater was the reason for confining witness to a statement of facts, and allowing the jury to estimate the damages under instructions of the court. The jury should have been left to determine the damages according to the facts, uninfluenced by the opinions of interested witnesses.

Same—Same—
Damages—
Evidence.

In the bills of lading executed by the defendant to plaintiff the following clause was incorporated:

Same—Limiting
Liability—Notice
of Claim.

"Fifth. That, as a condition precedent to any damages, or any loss or injury to live stock covered by this contract, the second party will give notice in writing of the claim thereof to some general officer or to the nearest station agent of the first party, or to the agent at destination, or some general

Note

officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock,—such written notification to be served within one day after the delivery of the stock at destination,—to the end that such claim may be fully and fairly investigated, and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims.”

The notice mentioned in this clause was not given, and the defendant insists that it was thereby relieved from liability for the claim sued for. The notice to be given was confined to “any damages, or any loss or injury to live stock covered” by the bill of lading. It does not appear to us that the damages sued for were covered by the bill of lading, and we think that the notice was not required, by the contract of the parties, to be given in this case.

Reversed and remanded for a new trial.

NOTE.

Carriage of Live Stock—Defective Pens—Contributory Negligence.
—The carrier of live stock cannot exonerate itself from damages resulting from a breach of its duty to furnish suitable stock-pens, on the ground that the owner of the stock saw the condition of the pens. *Mason v. Missouri Pac. R. Co.*, 25 Mo. App. 473.

Where stock tendered for shipment are placed in pens provided by the company it cannot relieve itself from liability for injuries occurring through defects in the pens, by showing that the owner had knowledge of such defects. *Gulf, C. & S. F. R. Co. v. Trawick*, 80 Tex. 270, 15 S. W. Rep. 568, 18 S. W. Rep. 948; *Galveston, etc., R. Co. v. Jackson* (Tex. Civ. App.), 37 S. W. Rep. 255; *East Line, etc., R. Co. v. Hall*, 64 Tex. 615. Compare *Gulf, etc., R. Co. v. Wood* (Tex. Civ. App.), 30 S. W. Rep. 715.

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HUTCHESON *et al.*

v.

LOUISVILLE & N. R. Co.

(*Court of Appeals of Kentucky, June 7, 1900.*)

Carriers of Freight—Discrimination—Competition—Constitutional Provision.*—Under section 218 of the constitution of Kentucky, making it unlawful for a railroad to charge or receive a greater compensation in the aggregate for the transportation of property of like kind, under similar circumstances and conditions, for a shorter than for a longer distance, over the same line, in the same direction, competition at one point which does not exist at the other does not of itself authorize the railroad to charge more for a shorter haul than for a longer haul.

Same—Same—Remedies.—Although the legislature has made the carrier liable to indictment for violating such constitutional provision, and no remedy has been provided for the person aggrieved, either by the constitution or the legislature, under the common law he may maintain an action against the carrier exacting and collecting from him more for a shorter haul than it charged another person for a longer haul, even though the amount charged him was not in itself unreasonable.

APPEAL by plaintiffs from Logan county circuit court.
Reversed.

W. P. Sandidge, for appellants.

W. F. Browder, H. W. Bruce, Edward W. Hines, and
Walker D. Hines, for appellee.

HOBSON, J. Appellants in the years 1894 and 1895 shipped a large quantity of tobacco from Auburn, Logan county, Ky., over appellee's road, and were charged by it for the transportation of the tobacco at the rate of 30 cents per 100 pounds. The distance from Auburn to Louisville is 132 miles. Guthrie, Ky., is another point on the same line, 163 miles from Louisville, and Hopkinsville is 188 miles from Louisville. During the same

Case Stated.

*See note, 13 Am. & Eng. R. Cas., N. S., 313.

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period when appellants were paying 30 cents per 100 pounds for the transportation of their tobacco, appellee carried tobacco from Hopkinsville to Louisville for 18 cents per 100 pounds, and from Guthrie for 24 cents; the tobacco from Hopkinsville and Guthrie being hauled through Auburn, and over the same route as that carried for appellants. On these facts, appellants filed this action to recover from appellee the amount paid it for the transportation of their tobacco over and above the amount charged by it for transporting tobacco under substantially similar circumstances and conditions from Hopkinsville. Appellee justified the difference in rates on the ground of competition at Guthrie and Hopkinsville, making it necessary for it to haul from these points at the reduced rate in order to get the business, and in the lower court appellants' petition was dismissed on this ground. But since the trial in the lower court this court, in the case of *Louisville & N. R. Co. v. Com.*, 46 S. W. 707, 15

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Am. & Eng. R. Cas., N. S., 841, 47 S. W. 210, 598, and in *Id.*, 51 S. W. 164, 1012, has held that competition at one point which did not exist at the other does not of itself

exempt the carrier from section 218 of the constitution. It is insisted, however, for the appellee, that the legislature, by section 819 of the Kentucky Statutes, has provided a remedy to the party aggrieved, where the carrier is guilty of extortion or unjust discrimination; but that

*Same—Same—
Remedies.*

this remedy does not include violations of the long and short haul clause, which are covered by section 820, *Id.*, providing for the indictment of the carrier in this state of case, but giving no right of action to the party aggrieved. It is earnestly argued that the legislature made the carrier liable to indictment for violating the long and short haul clause, but failed to give the person aggrieved a remedy, for the reason that the rate charged him might be reasonable, and he was not prejudiced by the carrier's charging some one at another point less than should have been paid. While there is great plausibility in this

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argument, we think the matter must be determined not from the statute, but from the constitution itself. Section 218 of the constitution is as follows: "It shall be unlawful for any person or corporation, owning or operating a railroad in this state, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this state, to receive as great compensation for a shorter as for a longer distance: provided, that upon application to the railroad commission, such common carrier, or person or corporation owning or operating a railroad in this state, may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time, prescribe the extent to which such common carrier, or person, or corporation, owning or operating a railroad in this state, may be relieved from the operations of this section." It will be seen that the above makes it unlawful for the carrier to charge or receive a greater compensation in the aggregate for the transportation of property of like kind, under similar circumstances and conditions, for a shorter than for a longer distance, over the same line, in the same direction; the shorter being included within the longer distance. The thing made unlawful is the greater charge for the short than for the long haul. The violation of this section does not consist in charging for the long haul less than is charged for the shorter, or in charging more or less than is reasonable for either. The carrier is given the right to fix the charge for the long haul, so far as this section goes; but he is not allowed, when he has done this, to charge more for the shorter than for the longer haul. When appellee charged 18 cents per 100 pounds for the car-

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riage of tobacco from Hopkinsville to Louisville, it violated no law. It only violated the law when it charged appellants for a shorter haul on the same route more than 18 cents. By this violation of law it obtained from them more money than it should have received. It is a familiar common-law rule that one who is aggrieved by a violation of law may have his action against the party committing the violation, to recover such damages as he has thereby sustained. This principle was recently applied in *City of Henderson v. Clayton (Ky.)*, 57 S. W. 1, and, under the principles announced in that case, appellants are entitled to recover the excess of freight collected from them. The prime purpose of the constitutional provision was the protection of the citizen from a greater charge for a short than for a longer haul. The constitution itself provides no remedy, civil or criminal, for its violation. The indictment of the carrier as provided by the statute may deter him from future violation of the law. But this will not remedy the wrong already done the shipper, and, when money is obtained in violation of the express terms of the constitution, its proper effect and purpose will be in a great measure defeated if the wrongdoer is allowed to retain the fruits of his illegal exaction. This is never allowed when money has been obtained in violation of a statute, where the statute is silent as to the remedy; and a constitutional provision cannot be less effective than a statute. The rule is thus stated in *Bish. Noncont. Law*, §§ 132-134: "Whenever the common law, a statute, a municipal by-law, or any other law imposes on one a duty, if of a sort affecting the public within the principles of the criminal law, a breach of it is indictable, and a civil action will lie in favor of any person who has suffered specially therefrom. Or, if the matter of the law involves only the interests of individuals, any one who has received harm from another's disobedience may have his suit against him for the damages. But if the law as interpreted was not meant to protect the class of persons to which the one suing belongs, or to protect anybody from the

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sort of injury complained of, or if in a way held to be exclusive it provides a different remedy, the action cannot be maintained." *Id.* § 132. "The reason of the doctrine is that remedy is inseparable from law, which cannot exist without it; that each particular remedy must be adapted to its corresponding wrong, being an indictment for a wrong to the public, and a civil action for one to an individual; and that still a statute creating a right, or any other statute, may ordain any different remedy which the legislature prefers." *Id.* § 133. "To illustrate: If the law confers on one the right to do a thing, another who prevents his doing it disobeys the law, and consequently is liable to a suit for the damages." *Id.* § 134. While there is some conflict of authority as to the rule in cases of violation of a municipal by-law, and the text in this respect has not been followed in this state the decisions are uniform in support of the text in all other respects. Other authorities are collected in the case of *City of Henderson v. Clayton*, above referred to. Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

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v.

COMMONWEALTH.

(Court of Appeals of Kentucky, June 7, 1900.)

Carriage of Freight—Discrimination—Constitutional Provision—Prosecutions.—Section 217 of the constitution of Kentucky does not require that prosecutions by indictment, for the violation of constitutional and statutory provisions against discrimination in freight charges, should be instituted by the attorney general.

Same—Same—Prosecutions.—There was no motion to dismiss such an indictment against defendant, based on the ground that the prosecution was not instituted on the recommendation of the railroad

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commission ; and question could not be raised for the first time on appeal.

Same—Same—Equality of Conditions.*—A carrier may charge a lower rate of freight for coal transported to a manufacturing establishment from which it eventually and inevitably obtains manufactured products for additional transportation, than it charges to a coal dealer, not in competition with the manufacturer, and whose business with the carrier is limited merely to the coal transported ; as in such case there is no equality of conditions, within the meaning of section 215 of the constitution of Kentucky.

APPEAL by defendant from Marion county circuit court.
Reversed.

Walker D. Hines, H. W. Bruce, and Edward W. Hines,
for appellant.

H. W. Rives, T. L. Edelen, and W. H. Sweeney, for the
Commonwealth.

HAZELRIGG, J. These appeals involve particularly the construction of section 215 of the constitution and of sections 817, 818, and 819 of the Kentucky Statutes. Incidentally
Case Stated. other sections of the constitution and the

Statutes will be noticed so far as they are supposed to affect the particular sections named. The constitutional provision is as follows : "Sec. 215. All railway, transfer, belt lines or railway bridge companies shall receive, load, unload, transport, haul, deliver and handle freight of the same class for all persons, associations or corporations from and to the same points and upon the same conditions, in the same manner and for the same charges, and for the same method of payment." The statutory sections are as follows : "Sec. 817. If any corporation engaged in operating a railroad in this state shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person a greater or less compensation for any service rendered in the transportation of passengers or property than it charges, demands, collects or receives from any other person for doing for him

*See *Hutcheson v. Louisville & N. R. Co. (Ky.)*, *ante* and *foot-note*.

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a like and contemporaneous service in the transportation of a like kind of traffic, it shall be deemed guilty of unjust discrimination." Section 818 makes it "unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic," etc. Section 819 reads thus: "Any railroad corporation that shall be guilty of extortion or unjust discrimination, or of giving to any person or locality, or to any description of traffic, an undue or unreasonable preference or advantage, shall upon conviction, be fined," etc. "The circuit court of any county into or through which the line or railroad may run, be owned or operated by the corporation alleged to be guilty as aforesaid, and the Franklin circuit court, shall have jurisdiction of the offense, which shall be prosecuted by indictment, or by action in the name of the commonwealth, upon information filed by the board of railroad commissioners," etc. "Indictments under this section shall be made only upon the recommendation or request of the railroad commission filed in the court having jurisdiction of the offense; and all prosecutions and actions under the law shall be commenced within two years," etc. As the manner of instituting prosecutions for violation of the constitutional provisions and the statutes on the subject involved is a matter in dispute here, we quote section 217 of the constitution, which is as follows: "Sec. 217. Any person, association or corporation willfully or knowingly violating any of the provisions of sections two hundred and thirteen, two hundred and fourteen, two hundred and fifteen or two hundred and sixteen, shall upon conviction by a court of competent jurisdiction, for the first offense be fined two thousand dollars; for the second offense five thousand dollars, and for the third offense, shall therefore, *ipso facto*, forfeit his franchises, privileges or charter rights; and if such delinquent be a foreign corporation it shall, *ipso facto*, forfeit its right to do business in this state; and the attorney general of the

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commonwealth shall forthwith upon notice of the violation of any of said provisions, institute proceedings to enforce the provisions of the aforesaid sections." Section 213 requires railroad companies to receive and handle loaded and empty cars and freight in car loads, etc., coming from other companies without discrimination or preference, etc. Section 214 was designed to compel the carrier to perform the service of receiving, transporting, and handling freight without exclusive or preferential contract or arrangement, and secures equality of service, leaving the succeeding section to secure equality of charges.

A preliminary question is raised by appellant growing out of the provision of section 217, to the effect that the attorney general of the commonwealth shall forthwith, upon notice of the violation of any of the provisions of sections 213-216, institute proceedings to enforce such provisions. These prosecutions are by indictment, and it does not appear that they were set on foot by the attorney general; hence it is claimed by the appellant company the prosecutions cannot be maintained. We do not think the contention tenable. The well-known and usual mode of inflicting punishment for a violation of the penal laws of the state is by a trial of the offender under an indictment, and, if the radical change claimed had been intended, we think plainer language would have been used. The language is not that the attorney general shall institute prosecutions for the enforcement of the penalties fixed for a violation of these sections, but that officer was to institute proceedings to enforce the provisions of the sections. It will be noticed that there are certain positive duties enjoined on the common carrier in which the public is vitally interested, and these, we do not doubt, the attorney general might require to be performed at the suit of the state. To punish by a criminal prosecution for a violation of law is one thing, and to institute proceedings to enforce the performance of duty is another. It is true, the punishment may induce the performance, but not neces-

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sarily. What the public wants at the hands of the carrier is performance of those important duties. It cares nothing for fines, except, indeed, as their infliction may possibly induce performance. The language, strictly followed, only purports to look to the enforcement of the provisions of these sections by the institution of proceedings by the attorney general, and not necessarily to the prosecution of the offender. Again, it is urged by appellant that, as the constitution does not provide in what particular way—if we hold it does not so provide—such prosecution shall be inaugurated, the matter was intended to be left to the legislature; and that it has declared that indictments for violation of the provisions of these sections shall be made only on the recommendation of the railroad commission, filed in the court having jurisdiction of the offense. And, as the record does not disclose such recommendation, there can be no prosecution. It would seem clear that the legislature has attempted to confide the inauguration of such prosecutions to this board. There seems, however, to have been no motion made to dismiss the prosecution based on the ground mentioned, and it is too late to make the question here for the first time.

Same—Same—
Prosecutions.

Nor do we decide or intimate that such prosecutions must be inaugurated by this board. The question is not before us. These preliminary questions aside, we come to the vital questions involved. The indictments, as already foreshadowed, charge the appellant with "unjust discrimination," and it is averred with some particularity how it did so. In substance, it is charged in indictment No. 519—the others differing only in names and amounts of rebate—that the carrier, after having received from the Lebanon Roller Mills the same rate of compensation for the transportation of coal to Lebanon, Ky., as it had unlawfully, willfully, and knowingly received from J. M. Shreve for the contemporaneous transportation of coal of a like amount, and of the same kind or class of traffic, in the same manner, and upon the same conditions, for the same distance, over the

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same line, in the same direction, and for the same method of payment, did willfully and knowingly refund and pay to the Lebanon Roller Mills a rebate of \$11.88 in pursuance of an agreement so to do in advance, and did fail and refuse to refund to J. M. Shreve any portion of the amount so collected for him as aforesaid, thereby willfully and knowingly charging and receiving from the Lebanon Roller Mills a less compensation for a service rendered in the transportation of coal to Lebanon, Ky., than it charged and received from J. M. Shreve for a like and contemporaneous service in the transportation of a like kind of traffic. Contrary, etc., the form, etc. There are probably some minor defects in these indictments. For example, the points from and to which the coal is alleged to have been transported ought to be set out, so that the carrier may know how to meet the accusation, and with respect to what shipments it is to prepare its proof. It is also noticeable that the qualifying phrases "of a like amount, and of the same kind or class of traffic, in the same manner, and upon the same conditions, for the same distance, over the same line, in the same direction, and for the same method of payment," are so grouped as to leave the construction of the sentence somewhat confused, and the meaning obscure. The effect of this we may notice later on. We shall assume that the averments of the indictments are sufficient to constitute the offense denounced by the constitution. The facts developed on the trial are not in dispute; and, using the same indictment we have already referred to as illustrating the facts of all of them, it appears that the Lebanon Roller-Mills Company was engaged in the business of manufacturing flour and meal at Lebanon, Ky., on the line of the carrier's road. The capacity of the plant was about 300 or 400 barrels per day, and its company shipped out and over appellant's road about two-thirds of the output of the mill. The company bought the coal it used for generating steam at the Eastern Kentucky mines,—Jellico, Middlesboro, Pittsburg, East Bernstadt, etc. This coal was shipped over the appellant road to Lebanon at the

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same rates which were published and announced for all buyers of coal by the appellant in the usual public way; but for all coal it used for steam purposes it got a rebate of 30 per cent., and this rate was also announced publicly on the tariff sheets of appellant, and was well known. The various coals used for steam purposes were known as "slack," "pea coal," "nut coal," sometimes "run of mines,"—unscreened coals,—and were inferior grades of coal. Shreve was a coal dealer, and sold that commodity for domestic use only. He used lump coal, and sometimes clean nut, grades demanded for domestic use, and which were higher grades than those used for steam purposes. The proof does not show that he ever used, or that his trade demanded, the steam coals, but it is admitted that, had he done so, he would not have been entitled to any rebate. Moreover, while the proof does not show that the manufacturing establishments in question in fact used other than the lower grades of coal, it is admitted that occasionally similar establishments did so, as it was not always possible to get the lower grades, or the higher grades might be desired for some special reason or occasion. In such exceptional event it is admitted the manufacturer would get the rebate. It was further shown that the demand for coal by the manufacturer was much more regular throughout the year than the demand by the domestic dealer. Upon these conditions being shown, it is the contention of appellant that there has been no violation of the law, because the freight shipments in question made to the Lebanon Roller-Mills Company and to Shreve, respectively, do not constitute an unjust discrimination, and were not made "upon the same conditions," within the meaning of the constitution.

There are several grounds on which the appellant rests its right to impose the discriminating rates in question. In the first place, it is claimed the classification adopted by the company, while formally otherwise, is substantially and practically a classification based on the quality and grades of the coal. Whatever may be the formal test applied to

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decide the rate applicable at the localities in question, the rule is that the manufacturer used the lower grades and the dealer the higher grades of coal. Whenever it happened otherwise, it was exceptional, and the carrier, it is contended, was authorized to maintain a rate based on the ordinary and usual course of trade, unaffected by rare and exceptional occurrences. In the second place, it is claimed that the carrier may charge a lower rate of freight for coal transported to a manufacturing establishment, from which it eventually and inevitably obtains manufactured products for additional transportation, than to a coal dealer, not in competition with the manufacturer, and whose business with the carrier is limited merely to the coal transported; that in such case there is no equality of conditions, or sameness of conditions, which will justify the coal dealer in demanding the rate which is given the manufacturer; that the manufacturer's coal is consumed on the premises in the creation of products which must be put back on the transporting line, enhanced in bulk and value, etc., by other commodities which enter into the manufactured product, and is then hauled to the markets. Moreover, a manufacturing plant requires other commodities besides coal—such as grain in this instance—to conduct its operations, while the coal dealer takes nothing but his coal; and that the freight derived by the carrier from the transportation of these commodities forms an important addition to its traffic, and constitutes a condition of business which has no existence in the business of carrying coal to those who are local dealers merely. In considering these grounds, while we have stated them separately, it is, of course, apparent that each and every element that enters into the business of transportation has to be taken into the account, and the result as a whole is to be considered in determining whether the conditions of particular transportations are the same, or are substantially the same. We say substantially, because it will not be contended that the conditions must be precisely the same. That could rarely happen. The application of

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the section is not to be denied merely because the conditions surrounding the shipment are not entirely the same. There must, on the whole, be a reasonable, just, and appreciable difference in the conditions before there can be allowed a difference in the rate. There must be a difference in the conditions that addresses itself to the intelligence and business common sense of the public, and those to whom, as triors under the law, such questions are to be determined. Such a difference, we believe, has been shown to exist in these cases. While it was understood and announced that steam coal was hauled at 30 per cent. less than other coals, yet, as the former was almost invariably an unscreened and lower grade of coal, and therefore of less value, the formal classification into "steam coal" and "domestic coal" was practically a classification into screened and unscreened coals. The proof makes this abundantly clear, and this is in accordance with common knowledge. In its substance, and for practical purposes, the proof brings the case within the principles announced in *Louisville & N. R. Co. v. Com. (Ky.)*, 48 S. W. 416, where CHIEF JUSTICE LEWIS, speaking for the court, said: "For that it is allowable and proper for a railroad company to classify freight according to its quality or character and marketable value, and discriminate in charges for carrying different classes or kinds, is not only universally recognized, but plainly authorized by section 215." However, the plan of the carrier for fixing and maintaining its coal rates as developed in these cases looks to a discrimination in rates growing out of its peculiar business relations to and connection with the manufacturer as such, and we therefore pass to a consideration of the reasons for such discrimination already briefly set out above. It is certainly true, as contended by appellant, that from and by reason of the transportation of the manufacturer's coal, and as a necessary consequence, there are products manufactured, which, coming again to the carrier, secure additional business for the road. It is known in advance, and without the form

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of an agreement, that these results will follow such shipments of coal to the manufacturer, and that a return trip, so to speak, will be secured over the carrier's road. Looking at the transaction as a whole, is there any difference in principle between it, and the ordinary transaction of a sale by a carrier of a return ticket to a passenger at a reduced rate? The steam coal starts from the mines to the manufacturer in one form, and the use to which it is put creates other commodities, which the carrier picks up as a result of the shipment in the first instance. Knowing all this in advance, the carrier, on business principles, encourages the first shipment, and advertises and arranges its rates accordingly. The case of *Hoover v. Railroad* (Pa. Sup.), 27 Atl. 282, is precisely in point. The court, in an elaborate opinion, said, among other things: "The plaintiffs were dealers in coal merely, while the nail company was a manufacturer of fabrics, and itself consumed the coal it received. They were, therefore, not competitors in the same business; and a lower rate to the manufacturer would not, under the contract, affect the business of the plaintiffs injuriously. * * * The business of the plaintiffs paid but one freight to the defendant, while the business of the nail company paid not only the freight, to wit, for hauling the coal to the nail works, but also, in addition to that, another and entirely independent freight to the defendant on all the products manufactured by the nail company. * * * The authorities are very clear and strong that, where an additional freight is obtained by means of the lower charge, the discrimination is justified both at common law and the statutes. * * * That a railroad company may lawfully secure to itself so important an addition to its business by making a lower charge to one customer than to others is fully established by the authorities, as we shall presently see." And the court proceeded to review the authorities fully, and sustained the discriminating rate in favor of the manufacturer. In *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 276, 12 Sup. Ct. 848, 36 L. Ed. 703, the supreme

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court had under consideration the legality of sale of party ticket rates at a reduced fare, and held their issual not to be an unjust discrimination, or an undue or unreasonable preference or advantage. In the course of that opinion, MR. JUSTICE BREWER, for the court, said: "It is not all discrimination or preferences that fall within the inhibition of the statute [interstate commerce act]; only such as are unjust or unreasonable. For instance, it would be obviously unjust to charge A. a greater sum than B. for a single trip from Washington to Pittsburg; but if A. agrees not only to go, but to return by the same route, it is no injustice to B. to permit him to do so for a reduced fare, since the services are not alike, nor the circumstances and conditions substantially similar, as required by section 2 to make an unjust discrimination." It is said, however, that there are certain qualifying words not found in our constitution, but found in the Pennsylvania constitution considered in *Hoover v. Railroad Co.*, *supra*, and also certain qualifying words in the interstate commerce act, and in the numerous authorities cited in these cases, showing that the services of the carrier were to be "like" services, or be free from "unjust discrimination," or "undue or unreasonable preference." This is true. For example, in the Pennsylvania law the carrier was prohibited from charging any person for the transportation of property a greater sum than it charged any other person "for like service from the same place, upon like conditions, and under similar circumstances." This is the purport of every law on the subject involved to which our attention has been called, and enactments of this character are found in perhaps every state in the Union. The purpose of all these are the same. Our own statute only prohibits different or discriminating charges "for a like contemporaneous service." Our constitution does not use these particular words, but uses the broader and more comprehensive expression, "upon the same conditions." These words must be taken as descriptive of the character of service the carrier performs in making its shipments, and have reference to the conditions which

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affect the freight transported, considered in its relations to both shipper and carrier. If the conditions under which any given shipments are made are not the same, or substantially the same, is there any just reason why the charges therefor must be or should be the same? If, for example, the cost is less for making a shipment of coal to A. in the month of July than it is in making one to B. in the month of August in any given year, should the freight charges on the two shipments be the same, because all railways must haul freight of the same class for all persons from and to the same points in the same manner, and for the same charges, and for the same method of payment? Nowhere in the words of our law can we find authority for saying that shipments of freight not contemporaneously made, or made at a different cost, are not embraced in the requirement that they are to be hauled in the same manner, and for the same charges, and for the same method of payment, except in the qualifying words, "upon the same conditions." Without these words, the law is an arbitrary and rigid rule, and unlike any of the numerous laws in any of the states of the Union on the same subject. Except these words "upon the same conditions" be taken as an adjective phrase looking to or indicating the conditions surrounding the shipment, the law becomes an arbitrary, unyielding enactment, and different rates could not be charged for freight of the same class when shipped in car-load lots and when shipped in less than car-load lots,—a thing expressly authorized under our statutes. We think the legislative construction of the constitution was the true construction, and that the same charges were to be collected for services in transportation when they were "like and contemporaneous services," being in such case performed under the same or similar "conditions." If, in the bill of lading for the coal in controversy, appellant had inserted the stipulation that the coal was carried at the reduced rate upon the condition that it was to be used for steam purposes in manufacturing, then admittedly this coal would not have been carried on the same conditions as the coal hauled for domestic

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purposes; yet this is in substance what appellant did, as the reduced rate was not allowed until written evidence to this effect was given. The case does not, therefore, fall within the letter of the section. But, although the case is not within the letter of the constitution, the question remains, is it within its fair purpose and spirit? The provision is highly penal, and it is a familiar rule that such provisions are not to be extended by construction to cases not fairly within their purview; for otherwise the innocent may fall into punishment. The common law required common carriers to serve all alike. In aid of this rule of the common law, the English railway and canal traffic act was passed in 1854, to forbid and punish discrimination. This was followed by the interstate commerce act by the United States, and similar statutes and constitutional provisions by many of the several states. The thing aimed at in all these statutes is the prevention of unjust discrimination. In the same line is section 196 of our constitution: "Transportation of freight and passengers by railroad, steamboat or other common carrier shall be so regulated by general law as to prevent unjust discrimination." Also section 214: "No railway * * * company shall make any exclusive or preferential contract or arrangement * * * for the conduct of any business as a common carrier." Section 215 is a part of the scheme covered by sections 196 and 214. It requires all railroads to transport in the same manner, for the same charges, and for the same method of payment of freight of the same class for all persons from and to the same points and upon the same conditions. The purpose was to secure equality between shippers, and prevent injustice or unjust discrimination. It cannot be maintained that the convention contemplated that there should be no discrimination, for it was notorious then there were many discriminations not regarded as unlawful, and section 194 expressly recognizes that such discriminations as are not unjust may be made. All shippers of coal were placed on equality by appellant, and all were alike allowed to ship at the reduced rate coal for steam purposes.

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There was nothing unreasonable in this, as not only an inferior quality of coal was thus used, but without it manufacturers in the interior towns in the state would be placed in hopeless competition with those having water transportation, and the operators of mines in this state would also be at a great disadvantage, for their competitors in the adjoining states (in some cases very near by) could get the reduced rate under the interstate commerce act. It cannot be believed that the constitutional convention intended such a result, or that, if they had contemplated it, they would have expressed their conclusions in such terms as they employed.

It is still further suggested that, without ignoring the grammatical construction of the section, and by regarding the clauses "of the same class," "from and to the same points," and "upon the same conditions" as adjective phrases qualifying the noun "freight," still the conditions meant by the section are those which immediately and actually pertain and attach to the freight,—that is the physical status and surroundings; and subsequent conditions, such as its contemplated use, cannot be taken into the account. This is clearly a more reasonable view of the section than the one which requires nothing to be established to fix the offender's guilt than that the freight shall be of the same class, and is shipped from and to the same points. But when we attempt to apply it as a fixed rule, we find it at once inadequate. Thus, obviously, the material conditions immediately attaching to any shipment of freight are those of quality and quantity. As the law expressly provides as to the quality or class, we need not give this element further attention. Two consignments of freight are tendered the carrier. One of them is for the hauling of 1,000 bushels of coal from Pittsburg to Lebanon; the other is for the hauling of 10,000 bushels from and to the same points. Now, if the quantity of the shipment is to be a controlling factor,—as it must under this construction,—then the carrier may haul for the large dealer or manufacturer at a less rate than for the small dealer or manufacturer, and this is an evil not at all to

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be tolerated under any construction. The larger concern would inevitably crush out its smaller competitors. The advocates of this latter construction therefore must deny its application for the reason that the contemplated use of the freight by competitors in business is a proper subject of inquiry, and may be taken into the account in determining whether the same conditions attach to any given shipments of freight. And this is all that is done under the construction we adopt. The whole transaction is scanned from the standpoint of the purpose of the law, which is to prevent unjust discrimination by the carrier in dealing with the public. If the conditions of the shipments are not "the same," or substantially so, if the services are not "alike," if the "preferences are undue" or "unreasonable," if the "discrimination is unjust" and unfair, the law has been violated. And, in determining whether these results follow, all the conditions of the shipment from its beginning to its ending are to be considered. All these expressions in the various statutes on the subject of unjust discrimination mean the same thing, and the authorities determining the effect of the various statutes on the subject involved are directly in point; and they, as said in the Hoover Case, "are very clear and strong that, when there is an additional freight obtained by means of the lower charge, the discrimination is justified both at common law and under the statutes." It cannot be suggested that a denial to the carrier of the right to make these rebates to the manufacturer will in the slightest degree even tend to lower the rates to domestic dealers. The result of the denial can only be disastrous to the manufacturers, particularly within the interior of the state, where cheap coal cannot be obtained over water courses. Or, if they are saved, it will be at the expense of the Kentucky mines, because all steam coals will be furnished at the cheap rate from outside the state under the interstate commerce act. It is true that it is not the business of a common carrier to build up this or that enterprise, and it can give no rebate to a manufacturer over a dealer merely because the use of the

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coal by the former may incidentally build up the manufacturing interests of the state. But the discrimination is allowable because it is not an unjust or unreasonable discrimination to give the rebate when two freight charges are secured instead of one only, provided always those in the same business are treated alike, and provided the discrimination is not hurtful to, and does not affect, others who deal in or use coal. The *Goodridge Case*, 149 U. S. 680, 13 Sup. Ct. 970, 37 L. Ed. 986, was where there was an undisputed secret discrimination made by the carrier between two competing "coal merchants," and, the services for each being the same, the rebate to one of them was held to be an unjust discrimination. While certain language of that case is to the effect that the carrier shall "put all its patrons upon an absolute equality," this could only mean they were to be so put when the charges were "for a like service from the same place, or upon like conditions, and under similar circumstances"; such being the very terms of the statute the court was considering. Upon the conceded facts and other facts established by the proof, we think there has been no violation of the law as we interpret it, and the judgment in each case is reversed, and cause remanded for proceedings in conformity with this opinion.

PAYNTER, J. (dissenting). The right of eminent domain enables a railroad to take private property for public use. It performs a governmental function in providing a highway for travel and for the transportation of freight. Except private persons for profit undertake the performance of these governmental functions, wise statesmanship would recognize the necessity, and provide the means for the carrying of passengers and the transportation of the world products. Wisdom counsels and justice demands the control within reasonable limits of the actions and conduct of citizens, and that the burdens which each shall bear shall be reasonable and equally distributed. Where a corporation secures the right to and performs governmental functions, there is an implied reservation in every such grant of the power to exer-

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cise reasonable control of its affairs to the end that the public interest may be served, and that persons who use it may be forced only to pay reasonable compensation for the service performed for them, and that the carrier may not be permitted to discriminate against any person entitled to enjoy its use. To accomplish this much-desired result, the people have been concerned to have constitutional provisions adopted and statutes enacted until nearly if not every state in the Union has laws, organic and statutory, for the regulation of common carriers. These laws have been enacted because it is dangerous to have a great unrestrained power in any government. It must be checked; it must be controlled; else the public welfare is threatened. The people are deeply interested in the maintenance of the great highways of travel in this country, and a just sense of right should make them desire to see that those who have invested their capital in them have fair treatment and receive proper reward for the capital invested. They should not, in an effort to restrain these public agencies, be guilty of the spoliation of their property. The regulations which they impose should be just and reasonable. While this is true, they should never grow weary of watching in an effort to properly restrain agencies performing governmental functions. Those who control the aggregated wealth invested in them sometimes grow insolent and arrogant, forgetting they owe any duty to the public, and deny the right of the people to have enacted and enforced reasonable laws for their regulation. While the courts should stand between regulations to enforce which would be spoliation of the property of the public agency, yet they should stand between the constitution and those who would destroy some of its provisions. Although a court may not agree with the policy which induced the enactment of a constitutional provision, it can never justify itself in the destruction of that provision of the constitution in the method of its interpretation. It is the power—the people—which created the constitution that should change its provisions, not the judiciary. That body, above all others, should sustain and enforce it.

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In the Lake Front Cases, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018, MR. JUSTICE FIELD said: "The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. * * * The state can no more abdicate this trust over property in which the whole people are interested than it can abdicate its power in the administration of government and the preservation of the peace. In the administration of government the use of such powers may, for a limited period, be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers, and exercise them in a more direct manner, and one more conformable to its wishes." In Railroad Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377, CHIEF JUSTICE WAITE said: "Where property is thus affected [with a public use], the business in which it is used is subject to legislative control. So long as use continues, the power of regulation remains; and the regulation may extend, not merely to provisions for the security of passengers and freight against accidents, and for the convenience of the public, but also to prevent extortion by unreasonable charges, and favoritism by unjust discrimination. This is not a new doctrine, but old doctrine, always asserted whenever property or business is, by reason of special privileges received from the government, the better to secure the purpose to which the property is dedicated or devoted, affected with a public use." The constitutional convention, being impressed with the idea that a common carrier should charge one person or company the same as another person or company for like service, adopted as part of the constitution a provision against any discrimination in rendering like services for any person, corporation, or company. The constitution does not provide for or authorize just discrimination or reasonable discrimination. The convention regarded that any discrimination was unjust and unreasonable, hence it intended that neither the courts nor the railroad commission should be called upon to

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determine whether the discrimination was unjust or unreasonable, therefore it used simple and unambiguous terms in prohibiting any discrimination in receiving, handling, and transporting freight.

The sections of the constitution bearing upon the question here involved read as follows:

(214) "No railway, transfer, belt line or railway bridge company shall make any exclusive or preferential contract or arrangement with any individual, association, or corporation, for the receipt, transfer, delivery, transportation, handling, care or custody of any freight, or for the conduct of any business as a common carrier."

(215) "All railway, transfer, belt lines or railway bridge companies shall receive, load, unload, transport, haul, deliver and handle freight of the same class for all persons, associations or corporations from and to the same points and upon the same conditions, in the same manner and for the same charges, and for the same method of payment."

The indictments are under section 215. That section recognizes that it is proper that freight should be classified, and the charges for carrying it fixed on such classification. The offense charged is not that there was not a proper classification, but that the carrier placed all coal in one class, and then gave a rebate to those who used it for a particular purpose. The carrier, by its tariff sheet, informed the people of Lebanon that it would discriminate in the charges for the shipment of coal against all who did not use it for steam purposes. It is not a question of the classification of coals, but of shippers. The character and quality of coal can enter into the question of its classification, but the uses to which one shipper may put it can never take it from its class for the purpose of making a difference in the rate of transportation. Section 215 is a command to all railways to receive, load, unload, transport, haul, deliver, and handle freight of the same class for all persons, etc., from and to the same points, and upon the same conditions, in the same manner, and for the same charges, and for the

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same method of payment. They are not only required to carry it in the same manner, and for the same charges, but the framers of the constitution did not intend that one shipper of freight of a certain class should even have any preference over another shipper of the same class of freight in the payment of the charges. While the word used in the section commanding the reception and transportation of the freight may be broad enough to cover every act connected with its shipment, yet so anxious were those who framed the constitution to prevent discriminations that they added that freight of the same class should be carried for all persons, etc., "upon the same conditions, in the same manner." They endeavored to use every word possible to prohibit discriminations between shippers of the same class of freight from and to the same points. Both carrier and shipper are protected by the clause to the effect that it shall be shipped "in the same manner"; that is to say, that it shall be shipped in the usual bulk, in the same kind of cars, etc., and in the usual way. The phrase "upon the same conditions" was not inserted for the benefit of the carrier, but for the protection of the shipper. It was used to prevent any kind of discrimination resulting from any restriction, regulation, act, or manner of receiving and handling or transporting freight. It was intended to comprehend every act or regulation not embraced in the specific terms used in the section. It has no reference to the business which the shipper may be conducting, his financial condition, the subsequent shipment of other products over the line of the carrier, or the profit which the carrier may derive therefrom. The word "conditions" does not qualify any other word or sentence in the section. It does not make conditional the imposition of the same charges when the same class of freight is shipped from and to the same points; neither does it provide for exceptional cases in the matters of charges, etc. It is used in the sense of stipulations, arrangements. The word does not have reference to the carrier and shipper in a business or personal sense, but to the contract or terms of shipment, whether they be expressed

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or implied. In order to justify the interpretation given the word, the court has transposed the words of the section, although grammatically constructed, and has interpolated into it the word "unjust." The section, as transposed, is not susceptible of the construction given it by the court. It is admitted by the court that the words "unjust discrimination and undue or unreasonable preference" are not found in our constitution, but it claims the constitution uses the broader and more comprehensive expression "upon the same conditions." We have endeavored to show that the use to which the transported product is applied is not a condition or element to be considered. To illustrate the meaning of the court, it furnishes an example of the shipment of coal in the month of July and in the month of December. Of course, it does not follow, because the carrier charged a certain price in July to A., that B. is entitled in December to have the same thing shipped for the same charges. But, if the carrier ships a car load of coal in July for A. and a car load for B. of the same class, from and to the same point, under the tariff rates then prevailing, the charge must be exactly the same. So, in December, when the shipments of the same class of freight are made from and to the same points, all persons are entitled to have it done for the same charge, as fixed by the tariff rates then prevailing. The illustration of the court is an unfortunate one if it was intended to support the construction which it has given to the section.

The court is again unfortunate in its effort to illustrate the correctness of its position when it quotes from *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699, where the court said: "It is not all discriminations or preferences that fall within the inhibition of the statute [interstate commerce act]; only such as are unjust or unreasonable. For instance, it would be obviously unjust to charge A. a greater sum than B. for a single trip from Washington to Pittsburg; but, if A. agrees not only to go, but to return by the same route, it is no injustice to B. to permit him do so for a reduced fare, since the

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services are not alike, nor the circumstances and conditions substantially similar, as required by section 2 to make an unjust discrimination." Of course, the services there performed are not alike. Instead of selling a ticket from one place to another, one was supposed to be sold to a given point and return. If it had been a discrimination, as the interstate commerce act recognized just discrimination, the court would have held that the selling of such a round-trip ticket was not unjust discrimination. The court, however, did say it would have been obviously unjust to charge A. a greater sum than B. for a single trip from Washington to Pittsburg. That is the offense charged in this case. It was the discrimination in the charges for the transportation of the same class of freight from one point to another. Suppose B. had not bought a round-trip ticket from Washington to Pittsburg, but bought a trip ticket from Washington to Pittsburg, and, under the rule of the company, if his purpose in going to Pittsburg was to buy goods, and ship them to Washington over the carrier's line, it would give him a rebate on the charge of transportation from Washington to Pittsburg, can anybody believe for a moment that the court in that case would have given an opinion that that was not an unjust discrimination? If the Lebanon millers are entitled to have a rebate upon the coal they ship over appellant's line, used for steam purposes, because the carrier carries wheat to the mill and flour from it, then a discrimination is made by reason of the volume of business which the owners of the mill furnish the carrier. Every other element is ignored in fixing rates, and discrimination becomes the rule, not the exception to it. It is a discrimination against every person who uses coal in the city of Lebanon. If the volume of business which a shipper furnishes the road will justify a carrier in giving him a less rate than other shippers receive for like service, then it follows that the freight rates are not to be fixed according to the mandates of the constitution, but according to the volume of business that is carried on by a shipper over the line of the carrier. It logically follows

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that, if there is a flour mill in Lebanon which manufactures only half so much as the mill in question, and only supplies half of the amount of business for the carrier, it would be authorized to fix the freight rates according to the volume of business each should furnish it. If one man should be engaged in the retail dry-goods business in Lebanon, and another should be engaged in the retail and wholesale dry-goods business there, then, because the wholesale man might reship some of the goods received by him over the line of the appellant, it could give him a less rate on the goods shipped by him than those shipped by the retail man. Again, suppose two gentlemen were engaged in that city in the grocery business, both of whom purchased their goods in Louisville, and from that point shipped them to Lebanon. One sold his goods for cash, and, of course, would have nothing to ship over the line of the appellant which he had taken in exchange for his goods; but the other grocery man exchanged all his goods for butter, eggs, poultry, and farm products, and found a market for them elsewhere, and to reach it it was necessary to ship them over the line of the appellant. If the reasoning of the court be sound, then the carrier would be justified, owing to the difference in the method which these two grocery men employed in conducting their business, and the profits which the appellant derived from the grocery man who exchanged his goods for other products, in charging the trading grocery man less for the transportation of his groceries to Lebanon than the one who sold for cash. Suppose, again, two men were engaged in the milling business at Frankfort, Ky., and the appellant transported the coal and wheat used by each of them from the same point, and that one of them shipped the products of his mill to market over the line of the appellant and the other shipped the product of his mill by the Kentucky river; if the business which the appellant would receive from the manufacturers of flour in the transportation of freight for them is to enter into the question of fixing the charges for the transportation of the coal necessary to operate their mills, the

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appellant would be justified in charging a less rate on the coal transported for the one who shipped the products of his mill over its line, although the coal may have been shipped from the same point, and at the same time.

It is said that it is not injurious to domestic consumers of coal in Lebanon that those who use it for steam purposes pay a less freight rate for its transportation. That is no reason for giving an interpretation to the constitution which does violence to its language and purpose. It is true, one of the evils intended to be remedied was to prevent discrimination by carriers which would foster one and injure or destroy another business along this line. There, however, was another great and weighty consideration with the constitutional convention, and that was that a carrier should be required to treat each citizen with equal fairness and consideration. It thought it was only reasonable that a carrier should carry the same quantity of the same class of freight from and to the same points for all persons for the same charge. It therefore enacted the provision of the constitution in question. To show that was the purpose of the convention, section 214 prohibits a railroad company from even making any exclusive or preferential contract with any individual, association, or corporation for the receipt, transfer, delivery, transportation, handling, care, or custody of any freight, or for the conduct of any business as a common carrier. So the two sections, taken together, not only prohibit any discrimination, but prohibit the making of any contract or arrangement that would have that effect. The court cites but one case (*Hoover v. Railroad Co.* [Pa. Sup.], 27 Atl. 282) which enunciates the doctrine that a railroad company may give to a manufacturer preferential rights in the transportation of his fuel because it derives a profit from the transportation of his manufactured products over its line. The court was construing a statute containing language materially different from the provisions of our constitution. The statute in that case prohibited the carrier from making "any undue or unrea-

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sonable discrimination." That language implies that a discrimination can be made so long as it is not undue and unreasonable, while our constitution does not recognize any discrimination as being reasonable or just. The court in *Interstate Commerce Commission v. Baltimore & O. R. Co.* had under consideration certain provisions of the interstate commerce act. The language of that act with reference to discriminations differs widely from the provisions of our constitution. Under sections 2 and 3 of that act, as adjudged in that case, the unlawfulness denied by sections 1 and 3 was "unjust discrimination," or "an undue and unreasonable preference or advantage." The court held that under those sections the possibility of just discriminations and reasonable preferences were recognized. The supreme court of the United States in *Railway Co. v. Goodridge*, 149 U. S. 680, 13 Sup. Ct. 970, 37 L. Ed. 986, had under consideration section 6, art. 15, Const. Colo., which reads as follows: "All individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager, or employee thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive power." And also section 7, p. 309, Sess. Laws Colo. 1885, which reads as follows: "(Unjust discrimination). No railroad corporation shall, without the written approval of said commissioner, charge, demand, or receive from any person, company or corporation for the transportation of persons or property, or for any other service, a greater sum than it shall, while operating under the classification and schedule then in force, demand or receive from any other person, company or corporation for a like service from the same place, or upon like conditions and under similar circumstances, and all concessions of rates, drawbacks, and contracts for special rates

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shall be open to, and allowed all persons, companies and corporations alike, at the same rate per ton per mile, upon like conditions and under similar circumstances, except in special cases design to promote the development of the resources of this state, when the approval of said commissioner shall be obtained in writing," etc. While the constitutional provision there in question prohibited undue and unreasonable discriminations, this language recognized the possibility of discriminations that would not be undue or unreasonable. Under the statute made pursuant to the provisions of the constitution any person aggrieved by a person, company, or corporation who violated the constitutional provision and the statute was entitled to recover three times the amount of the actual damages sustained or overcharges paid. The injured parties sought to recover under that statute. The company had charged one shipper for freight on coal over and above what it charged another for the like service. The court held that this could not be done, and adjudged that the plaintiff was entitled to recover. The conclusion was reached that such discrimination was undue and unreasonable. This court, under a constitutional provision which prohibits any discrimination, holds that to charge one shipper more for like services than another is not unjust discrimination. Under the opinion of the court, if two consumers of coal at Lebanon should have exactly the same quantity of coal of the same class shipped from the same point in Kentucky over appellant's line to Lebanon, and one of them should save the ashes of the coal, and ship them over appellant's line, it could give him a rebate on the coal shipped by him because of the business given it in the transportation of his ashes. Besides, it would logically follow from the opinion that the more of other freight shipped for a consumer of coal the greater the rebate the carrier would be authorized to give on the coal shipment without being guilty of unjust discrimination. So the result would be that the charges for the shipment of coal would never depend upon the kind of service rendered in its transporta-

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tion, but upon the volume of other business which the shipper of coal might furnish the carrier. If the court was correct in saying the phrase "and upon the same conditions" did not have reference to the stipulations, regulations, arrangements, and mode of shipment, etc., then by the most unnatural, unreasonable, and arbitrary method the court gives it a meaning not warranted by the letter or the spirit of the law, for it justifies a discrimination, not upon any difference in the time of shipment of the coal, or the quantity shipped, or circumstances or conditions affecting the shipment, but because the carrier transports products other than coal for the shipper. So anxious was the court to interpolate the words "unjust discrimination" in section 215 that it quotes section 196, which contains these words, the court adding that section 215 is part of the scheme covered by sections 196 and 214. Sections 214, 215, 216, and 217 refer to railroads, transfer, belt lines, and railway bridge companies organized under the laws of Kentucky, etc. These sections in plain terms designate the common carriers mentioned, and seek to regulate them in the manner therein provided, and they appear in the constitution under a heading "Railroads and Commerce." While it used the words "unjust discrimination," it cannot with reason be contended that section 196 was intended to qualify the meaning of section 215. The part of section 196 relied upon simply declares that the legislature should enact laws to prevent unjust discrimination by railroads, steamboats, or other common carriers. Section 215 prohibits any discrimination, and, of course, the legislature could only enact a law which would prevent any discrimination by railroads. It was not intended to confer upon the legislature the right to designate what might be unjust discrimination, as section 215 in effect declares that any discrimination is unjust, and that every person is entitled to have the same class of freight shipped at the same price that any other person or company is entitled to have it shipped to and from the same points. If the constitutional convention had intended to leave to the legislature

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the right to determine what should constitute unjust discrimination, then it was folly for the constitutional convention to have inserted section 215. It needs no legislation to enforce section 215, as decided by this court in *Louisville & N. R. Co. v. Com.*, 48 S. W. 416. Section 217 prescribes the penalty for violation of sections 213, 214, and 215 in express terms, and this court so held. It is absurd to say that section 196 has any connection with section 215, or in any sense bears upon the question of its interpretation. We are of the opinion that any statute is violative of section 215 of the constitution which authorizes a carrier to make any discrimination in the matter of charging for the carrying of freight of a certain class for any person, company, or corporation from and to the same points. We are also of the opinion that the grand jurors of the various counties of the state have the right, independent of any recommendation of the railroad commission, to return indictments against common carriers for the violation of sections 213, 214, 215, and 216 of the constitution. The constitutional provisions name the penalties which the carriers incur for the violation of these sections. Legislation is not needed to enforce their provisions, and it was never intended by the framers of the constitution to take from the grand jurors of the several counties of the state the right to inquire into and indict persons who violate the provisions of the constitution to which we have referred. The power which created the constitution provided this court as an instrumentality to uphold it. Instead of doing so with reference to section 215, it has, as we believe, practically destroyed it by its opinion in these cases.

WHITE and GUFFY, JJ., concur.

Whicher v. Boston & A. R. Co

WHICHER

v.

BOSTON & A. R. Co. *et al.*

(*Supreme Judicial Court of Massachusetts, June 5, 1900.*)

Baggage—Liability for Loss While in Custody and Control of Passenger.*—Where the passenger keeps the baggage in his own custody and control, neither a railroad company, a sleeping-car company, nor a palace-car company owes, in regard to baggage, the duty imposed by law on carriers or innkeepers; and are only required to exercise reasonable care, and are liable only when the loss is due to the negligence or misconduct of the servants or agents of the carrier; and, therefore, there can be no recovery against either the railroad company or the sleeping-car company, where it merely appears that the passenger abandoned his traveling bag in his section of a sleeping car running in the daytime as a day car, where it had been carried by the porter, for five hours, while he was in the smoking car, and found it gone upon his return.

EXCEPTIONS by plaintiff from Suffolk county superior court. *Overruled.*

Brandeis, Dunbar & Nutter and *Edw. F. McClennen*, for plaintiff.

A. H. Russell, for defendants.

LATHROP, J. There is no material dispute about the facts in this case. The plaintiff was a passenger on a sleeping car of the Wagner Palace-Car Company, which was hauled, with other cars, from Albany to Boston by the Boston & Albany Railroad Company, leaving Albany at 3 o'clock in the afternoon, and arriving in Boston at 9 in the evening. The Wagner Palace-Car Company had no control of the car in so far as its movement over the roadbed was concerned, but retained the internal management thereof, and hired the

*See article by Mr. Rose, 2 Am. & Eng. R. Cas., N. S., at p. xxvii.

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porter and conductor for said car. Although there was some discrepancy in the evidence on the point whether the plaintiff carried his traveling bag to his section or whether the porter carried it for him, we assume, in favor of the plaintiff, that the porter carried it for him. The bag was placed in the section nearest the front door of the car. The plaintiff remained by it for 10 minutes, and then went into the smoking compartment of the car, which was at the rear end. He remained there half an hour, and then returned to his section, took something out of his bag, and returned to the smoking compartment, and remained there until the train was approaching Boston. He then went to his section, and his bag was gone. Search was made for it, but it could not be found. The train made three stops between Albany and Boston, namely, at Pittsfield, Springfield, and Worcester. The porter testified that he received one passenger at Pittsfield, but none at the other two stations; that two passengers left the car at Springfield, neither of whom had a hand bag; that no passengers left at the other stations; and that, while the train was in motion, passengers walked back and forth from the other coaches. He further testified that there were three sleeping cars on the train, and it appeared that there were also ordinary cars. The principles of law which govern these cases we consider to be well settled. In the first place, neither a railroad company, a steamboat company, a sleeping-car company, nor a palace-car company owes to a passenger, in regard to baggage, the duty imposed by law on carriers or innkeepers, where the passenger keeps the baggage in his own custody and control. The only obligation imposed upon them is that of exercising reasonable care, and they are liable only when the loss is due to the negligence or misconduct of the servants or agents of the carrier. Railroads: *Tower v. Railroad Co.*, 7 Hill 47; *Henderson v. Railroad Co.*, 123 U. S. 61, 8 Sup. Ct. 60, 31 L. Ed. 92; *Railroad Co. v. Handy*, 63 Miss. 609. Steamboats and steamships: *Clark v. Burns*, 118 Mass. 275; *The Crystal Palace v. Vanderpool*, 16 B. Mon. 302; *Abbott v. Bradstreet*, 55 Me. 530; Steam-

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ship Co. v. Bryan, 83 Pa. St. 446; Gleason v. Transportation Co., 32 Wis. 85; The R. E. Lee, 2 Abb. U. S. 50, Fed. Cas. No. 11,690. In New York, however, a steamboat is regarded as a floating inn, but we believe this view is peculiar to that state. Adams v. Steamboat Co., 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, affirming several earlier cases in that state. Sleeping cars: Louis v. Sleeping-Car Co., 143 Mass. 267, 273, 9 N. E. 615; Palace-Car Co. v. Smith, 73 Ill. 360; Sleeping & Parlor Coach Co. v. Diehl, 84 Ind. 474; Carpenter v. Railroad Co., 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759; Welch v. Palace-Car Co., 16 Abb. Prac. (N. S.) 352; Root v. Sleeping-Car Co., 28 Mo. App. 199. It is obvious that a higher degree of care is required during the night, when a passenger is asleep, than is required in the daytime, when he can look after his own effects. See cases *supra*. Palace-car day coaches: Whitney v. Palace-Car Co., 143 Mass. 243, 9 N. E. 619. It is also well established that the mere loss of an article is not evidence of negligence on the part of the defendant. Something more must be shown. Carpenter v. Railroad Co., 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759; Sessions v. Railroad Co., 78 Hun 541, 29 N. Y. Supp. 628; Efron v. Palace-Car Co., 59 Mo. App. 641; Stearn v. Car Co., 8 Ont. 171. In Lewis v. Sleeping-Car Co., 143 Mass. 267, 9 N. E. 615, relied upon by the plaintiff, there were two larcenies the same night, and the porter, who was required to be on duty continuously for 36 hours, including two nights, was found asleep in the early morning. These facts were held to be evidence of negligence. There is no occasion to cite many cases on the point that the plaintiff must show that he was in the exercise of reasonable care. In Whitney v. Palace-Car Co., 143 Mass. 243, 9 N. E. 619, the plaintiff, a woman, was traveling on a day car of the defendant company. At Portsmouth she and her husband left the car for 10 minutes, leaving her satchel upon the sill of one of the car windows, "a conspicuous and exposed place, which could be reached from the outside through an adjoining window, which was open." It was held that her own

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negligence contributed to the loss, and that she could not recover. See, also, *Henderson v. Railroad Co.*, 123 U. S. 61, 8 Sup. Ct. 60, 31 L. Ed. 92; *Efron v. Palace-Car Co.*, 59 Mo. App. 641.

Applying these principles to the facts of this case, we are of opinion that the judge rightly directed the jury to return a verdict for the railroad company. The plaintiff, instead of having his bag checked, chose to retain the control and custody of it. If it had been lost through any fault or negligence of the agents or servants of the railroad company, and the plaintiff had been in the exercise of due care, the case would be different. In *Kinsley v. Railroad Co.*, 125 Mass. 54, the defendant's servants and agents, while the passengers were at dinner at a way station, removed the sleeping car, in which the plaintiff and others left their baggage, from the train, and the baggage was put on another car. Part of the plaintiff's baggage was lost in removal. This case differs essentially from the one at bar.

As to the liability of the last-named defendant, we are of opinion that the judge erred in submitting the case to the jury. The bag was in no just sense delivered into the sole custody of this defendant. While its servant was carrying the bag into the car, it may have been in the sole custody of the defendant for the moment, but the plaintiff renewed his custody and control over it. Instead of looking out for it, he abandoned it for over five hours. It seems to us that the case falls clearly within that of *Whitney v. Palace-Car Co.*, 143 Mass. 243. 9 N. E. 619, and is very similar in its facts to *Efron v. Palace-Car Co.*, 59 Mo. App. 641. Nor do we see any evidence of a breach of any duty which the last-named defendant owed the plaintiff, or what there was for the jury to pass upon. The car was equipped with its usual force of servants. It was running in the daytime as a day car. There was no necessity for the care required in a sleeping car when passengers are asleep. All that was required was the exercise of reasonable care. As has been before stated, the mere loss of the bag was not evidence of a want of such care.

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There was no evidence of a breach of the defendant's rules by the porter, as in the case of *Dawley v. Palace-Car Co.*, 169 Mass. 315, 47 N. E. 1024. The porter in the case before us, for aught that appears, in every way performed his duty, and we see no ground for holding the last-named defendant responsible. The result is that the plaintiff's exceptions must be overruled, and the exceptions of the last-named defendant be sustained. So ordered.

LOUISVILLE & N. R. Co.

v.

PITTMAN.

(*Court of Appeals of Kentucky, Nov. 28, 1900.*)

Farm Crossings—Continuing Duty—Limitations.—Under a railroad charter providing that the company shall provide farm crossings whenever necessary, and that for a failure to comply with such provision, it shall be liable in an action for damages by the land owner, the duty, as well as the liability, is continuing; and a cause of action for such failure is not barred by limitations.

APPEAL by defendant from Boyle county circuit court.
Affirmed.

R. P. Jacobs, C. R. McDowell, and Edward W. Hines, for appellant.

Robt. Harding, for appellee.

WHITE, J. The appellee brought this action for damages for a failure by appellant to construct and maintain for his use and benefit a crossing over appellant's road where the same runs through the land of appellee, dividing his farm. Appellant presented an issue as to the necessity of the crossing, pleaded the statute of limitations, and denied any damage. A trial resulted in a verdict and judgment for appellee for \$200, and from that judgment this appeal is prosecuted.

Case Stated.

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The charter of appellant (section 16) provides: "That whenever in the construction of said road or roads, it shall be necessary to intersect any other established road or way, it shall be the duty of said president and directors so to construct said road across such road or way that it shall not impede the passage of persons or property along the same; or when it shall be necessary to pass through the land of any person, it shall also be their duty to provide for such person proper wagon ways across said railroad, from one part of the land to the other, and if said company shall fail to provide proper wagon ways across said road, as provided in this section, it shall be lawful for any person to sue said company, and be entitled to such damage as a jury may think him or her entitled to for such neglect."

It is seriously contended for appellant that as it is pleaded, without denial, that the road of appellant at the place complained of was constructed in 1865, the cause of action for failure to make the crossing was, long before this action, barred by the statute of limitations. This is the only question argued by counsel, and it may be considered that all other questions raised by the motion for new trial are conceded insufficient to present as grounds for reversal. We are of opinion that the cause of action herein is not barred by limitations. It was the duty of appellant, when the road was first constructed, to provide proper wagon ways across its road for the use of the landowner whose land was divided by the line of road, and this duty existed on appellant all the time from the first construction up to the present. What may be a proper and necessary wagon way to-day might not have been necessary at the time of the construction of the road, in 1865. At the date of the original construction of the railroad the whole of appellee's farm may have been forest, and at that time no road way would have been necessary. As it is shown now to be in cultivation, a wagon way is necessary and proper. We are of opinion that the provision of the charter *supra* makes the duty, as well as the liability for a failure, continuing. The question is always in

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the present: Is it proper or necessary for the landowner to have a crossing over the railroad from one part of his land to the other? This question answered in the affirmative, the duty rests on appellant to provide such crossings. For a failure to provide such crossings after the necessity becomes known, or after request, would render appellant liable to the action as provided in the section.

We find no error in the admission or rejection of testimony, nor in the instructions given. The jury were limited, in estimating the damages, to five years before the bringing of this action, which is not prejudicial to appellant. The amount assessed, \$200, is not excessive. Finding no error, the judgment is affirmed.

BOWEN

v.

SOUTHERN RY. CO.

(*Supreme Court of South Carolina, July 16, 1900.*)

Crossings—Signals—Statute—Instructions—Harmless Error.—Although defendant was not guilty of negligence, under the statutory provision in question, if it either rang the bell or blew the whistle, when approaching the crossing, it was harmless error to make a careless statement in an instruction from which it might be inferred that both signals were imperatively required; as the judge read the statutory provision to the jury.

Same—Same—Statutes—Negligence—Pleading.—Under the act of 1898 of South Carolina entitled "An act to regulate the practice in the courts of this state in actions *ex delicto* for damages," in an action under Rev. St. of South Carolina, §§ 1685, 1692, where the acts of negligence alleged are (1) failure to comply with the statutory requirements as to signals; (2) "causing the said locomotive and train of cars to approach the plaintiff without warning, and unexpectedly to him and at a high rate of speed," plaintiff may submit to the jury both acts of negligence.

Instructions.—A charge is to be considered in its entirety.

Appeal—Review.—If, in stating the issues, it was error to limit plaintiff's contributory negligence to his "carelessness in not observ-

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ing the train, defendant should have called the court's attention to the error, if it intended to rely upon it as a ground of appeal.

Crossings—Signals—Negligence Per Se.*—It is negligence *per se* in a railroad company to fail to give the crossing signals required by section 1685, Rev. St. of 1893 of South Carolina.

Instructions.—Defendant could not complain that the charge was not sufficiently comprehensive in regard to contributory negligence, as it failed to present a request on the subject.

Contributory Negligence.—Where a person's injuries result from his want of ordinary care combined with actionable negligence on the part of another, his contributory negligence is the proximate cause of his injuries.

Instructions.—Defendant was not prejudiced by a modification of a request to charge, as the only error it contained was in its favor.

Negligence.—It is the duty of the court to instruct the jury as to what constitutes negligence, and it is the duty of the jury to decide whether it exists in a particular case.

Instructions.—The harmless omission of words in a charge is no ground for reversal.

Same—Contributory Negligence—Statute.—It was proper to refuse to charge in accordance with a request which contained a charge upon the facts, and deprived plaintiff of his right to recover unless he was guilty of gross negligence, as provided by such statute.

APPEAL by defendant from Pickens county common pleas circuit court. *Affirmed.*

T. P. Cothran, for appellant.

Morgan & Blassingame, for respondent.

GARY, A. J. The record contains the following statement of facts: "Action for damages to person and property, \$1,950, alleged to have been sustained by G. W. Bowen, plaintiff, in a collision with defendant's train at a highway crossing on November 2, 1898, near Easley, in Pickens county. The action is brought under the statute requiring certain signals to be given by railroad companies as their trains approach a crossing, the negligence alleged being a failure on the defendant's part to observe said requirements. The defendant answered, deny-

*See *Crawford v. Chicago G. W. Ry. Co.* (Iowa), 16 Am. & Eng. R. Cas., N. S., 628; *note*, 11 Am. & Eng. R. Cas., N. S., 857 *et seq.*

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ing the said injury and pleading contributory negligence. The cause was tried before JUDGE ERNEST GARY and a jury at Pickens on October 26, 1899. The jury rendered a verdict in favor of the plaintiff for \$1,925. Upon motion for a new trial the circuit judge granted an order allowing a new trial unless the plaintiff within ten days remitted all of said verdict in excess of \$1,200. Plaintiff duly remitted said excess, and entered up judgment for \$1,200 and costs. Within ten days after the rising of the court the defendant gave notice of intention to appeal, and within due time served the exceptions."

The first exception is as follows: "The presiding judge charged the jury as follows: 'But, if it [railroad company] did conform to the statute as to blowing the whistle and ringing the bell, then they would not be liable, if there was no want of ordinary care.' Such charges being erroneous in the following particulars: (a) In imposing upon the defendant the duty of both blowing the whistle and ringing the bell, whereas the statute exculpates it if either signal is given. (b) The action was brought under the statute (Rev. St. §§ 1685, 1692), and the only negligence alleged was the failure to give the statutory signals. The plaintiff was not entitled to recover upon proof of any other negligence. The judge's charge required the defendant to disprove the negligence alleged, and to show, also, that it was guilty of no other act of negligence, or allowed the plaintiff to recover upon some act of negligence not alleged." We will first consider subdivision "a." The presiding judge read to the jury the section of the Revised Statutes mentioned in the exception. In the case of *Smith v. Railway Co.*, 53 S. C. 121, 30 S. E. 697, the court uses this language: "This court has frequently declared the rule to be that, when a judge has once laid down the law correctly, he will not be held to a stern responsibility if he failed thereafter to charge requests embodying the law which he has already charged. It seems to us not to be reversible error, if a judge has read the statute itself in the presence of

Crossings—Sig-
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the jury, and should thereafter, in commenting upon the law, drop the disjunctive conjunction 'or,' using instead the copulative conjunction 'and,' unless he was doing more than running over the statutory proviso. If, however, the circuit judge was subjecting the language employed in the statute to a critical analysis, whereby and wherein it became important that the difference in meaning and effect between the word 'and' and 'or' should be carefully noted, then in such instance it would be error; but, as in case at bar, and under its surrounding facts, for the circuit judge to ignore the distinction, if error at all, would be harmless error."

This ruling shows that said subdivision cannot be sustained. Subdivision "b" will next be considered. The defendant's negligence is thus alleged in paragraph 3 of the complaint:

"(3) That the defendant, by its servants, agents, and employees having in their care, control, and management a certain locomotive engine and train of cars thereto attached, forming train number 2, and south bound, carelessly, negligently, and wrongfully failed to sound the whistle of said locomotive or ring the bell thereon as was required by the law of the said state, appearing as section 1685 of the Revised Statutes of 1893 of said state, and caused the said locomotive and train of cars to approach the plaintiff without warning, and unexpectedly to him and at a rapid and high rate of speed, while he was attempting to go over said crossing as aforesaid, and, without his fault, caused said locomotive to strike him, severely cutting and bruising various parts of his body, causing great suffering and pain, and permanently injuring him." The acts of negligence alleged are (1) failure to comply with the statutory requirements as to signals; (2) "causing the said locomotive and train of cars to approach the plaintiff without warning, and unexpectedly to him, and at a rapid and high rate of speed." The plaintiff, under the act of 1898 entitled "An act to regulate the practice in the courts of this state in action *ex delicto* for damages," had the right to submit to the jury both acts of alleged negligence.

Same-Same-
Statutes-Negli-
gence-Pleading.

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The exception is as follows: "The presiding judge charged the jury as follows: 'If the railroad did not conform to the statute in blowing the whistle and ringing the bell, then the law says that it is liable;' such charge being erroneous in the following particulars: (a) In imposing upon the defendant the duty of both blowing the whistle and ringing the bell, whereas the statute exculpates it if either signal is given. (b) The statute does not impose an absolute liability upon the defendant for a failure to comply with the requirements as to signals, but such liability attaches only under these circumstances: (1) An injury to person or property by collision with the train must have occurred; (2) the collision must have taken place at a highway crossing; (3) the neglect to give the signals must have contributed to the injury; (4) the injured must not have been guilty of gross negligence contributing to the injury." Subdivision "a" is disposed of by what was said in considering the first exception. We will next consider subdivision "b." The exception sets out only a portion of the sentence in which the presiding judge charged the jury as therein stated. He also read the statute, as explanatory of his words. The charge must be considered in its entirety, and when thus considered it will be seen that subdivision "b" cannot be sustained.

The third exception is as follows: "The presiding judge charged the jury as follows: 'The defendant railroad company says that he [the plaintiff] has not been injured, and, if he has been injured, it was through his own carelessness in not observing the train, and that they were not at fault because they did not ring the bell or blow the whistle.' The defendant contended that the plaintiff was guilty of contributory negligence, under all circumstances detailed, in driving upon the track in an empty wagon, between two other empty wagons, making a great deal of noise, without looking out for the train; that the signals were given, and the plaintiff must have heard them, but recklessly drove upon the track in attempting to cross in

Instructions.

Appeal—Review.

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front of an approaching train. It was error, therefore, to limit the plaintiff's negligence, as the circuit judge did, to his 'carelessness in not observing the train.' " The foregoing words were used by the circuit judge in stating the issues made by the pleadings, and, if he made a mistake, it was the duty of the defendant to call his attention to the mistake, if it intended to rely upon it as a ground of appeal. *Westbury v. Simmons* (S. C.), 35 S. E. 764.

The fourth exception is as follows: "The presiding judge charged the jury as follows: 'If the railroad company failed to blow the whistle or ring the bell in accordance with the requirements, that would be negligence on the part of the railroad company; and if, as a result of that negligence, it came into collision with the defendant [plaintiff?] and injured him, the railroad would be liable, and should compensate him for such damages as he has sustained, unless he was negligent in being upon the railroad track.' Error is imputed for the following reasons: (a) The statute makes the railroad company liable only in case it omits both the signals required. This charge makes it liable for failure to give either signal. (b) Said portion of the judge's remarks is a charge upon the facts, and a statement of the testimony, in violation of the constitution. (c) It limits the contributory negligence of the plaintiff to his negligence 'in being upon the track.'" Subdivision "a" has already been disposed of. The case of *Smith v. Railway*

Crossings—Sig-
nals—Negligence
Per Se.

Co., hereinabove mentioned, shows that subdivision "b" cannot be sustained, as it is negligence *per se* to fail to comply with the said statutory requirements. We will next consider subdivision "c." The acts of contributory negligence relied upon by the defendant are not specified in the answer. The proposition of law embodied in the charge was sound. If the defendant desired a more comprehensive charge, it could have accomplished it by presenting requests to that effect.

Instructions.

The fifth exception is as follows: "The presiding judge

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erred in refusing to charge the defendant's second request, which was as follows: 'It may have been possible that the disaster would have occurred even if there had been no gross negligence on the part of the plaintiff, and yet, if there was such negligence on his part, and it contributed to the disaster, the plaintiff cannot recover.' Said request contains a correct proposition of law, and was intended to convey the idea that the gross negligence of the plaintiff need not be the proximate cause of the disaster, but that, if it contributed in any way to it, the plaintiff could not recover." When the law speaks of an act of negligence as contributory to an injury, it means as a direct Contributory Negligence. and proximate cause thereof. Contributory negligence is thus defined in 7 Am. & Eng. Enc. Law (2d Ed.) p. 371: "Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another combining and concurring with that negligence, and contributing to the injury, as a proximate cause thereof, without which the injury would not have occurred." This definition is approved in Cooper v. Railway Co. (S. C.), 16 Am. & Eng. R. Cas., N. S., 12, 34 S. E. 16. Subdivision "b" must therefore be overruled.

The sixth exception is as follows: "The defendant's third request to charge was as follows: 'Gross negligence is equivalent to the absence of slight care. If, therefore, at the time of the collision the plaintiff did not exercise slight care to avoid the collision, and such negligence contributed to the disaster, the plaintiff cannot recover.' The presiding judge modified it as follows: 'I charge you that, with this qualification: If the failure to exercise ordinary care [existed], and that failure amounted to gross negligence, then he could not recover, and negligence is a question of fact for you.' Error is imputed to such modification for the following reasons: (a) The request states a correct principal of law applicable to the case, and defendant was entitled to have the jury so instructed. (b) The pre-

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siding judge substituted 'ordinary' for 'slight' care, which totally changed the meaning of the request. (c) The modification was erroneous and confusing, for it is impossible that the failure to exercise ordinary care can ever constitute gross negligence. (d) Negligence is not a question of fact for the jury, but a mixed question of law and fact. (e) The rule stated in 'd' did not prevent the presiding judge from charging said request." The request contained a sound

Instructions. proposition of law, and should have been charged without modification; but the defendant has no ground of complaint by reason of the modification, as it was too favorable to it. After the presiding judge had defined negligence, it was not reversible error to tell the jury that negligence was a fact for them. It is the duty of the presiding judge to instruct the jury as to what constitutes negligence, and it is the duty of the jury to decide whether it exists in a particular case.

The seventh exception is as follows: "The defendant's fourth request to charge was as follows: 'If the plaintiff at the time of the alleged collision did not exercise that kind of care which even the careless and indifferent
Negligence. would be expected to exercise under the circumstances, and such want of care contributed to the disaster, he cannot recover a verdict.' The presiding judge modified it as follows: 'I charge you that, with this qualification that, if that care which a careless or indifferent person would be expected under ordinary circumstances to observe would amount to gross negligence, then he cannot recover.' Error is imputed to such modification for the following reasons: (a) In omitting the words 'in want of,' immediately preceding the words 'that care,' in the second sentence in said modification. (b) The request states a correct principle of law applicable to the case, which the defendant was entitled to have submitted to the jury. (c) Defendant was entitled to the charge that the absence of that care which even the careless and indifferent would be expected to exercise under the circumstances, as matter of law, amounted to

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gross negligence, and it was error to submit that question to the jury." We proceed to a consideration of subdivision "a." The language of the circuit judge modifying the request shows upon its face that words were accidentally omitted. It, however, appears that the only modification intended was to substitute the word "ordinary" in the place of the word "the," immediately preceding the word "circumstances." Even conceding that the request was free from error, the modification was not prejudicial to the defendant, and enabled the jury more clearly to comprehend the proposition of law embodied in the request. As the circuit judge only modified the request in the particular hereinbefore mentioned, he did not submit to the jury whether the absence of that care which even the careless would be expected to exercise amounted to gross negligence. when the charge is considered as a whole, it will be seen that it was not erroneous in the particular just mentioned.

The eighth exception is as follows: "The seventh request of defendant was as follows: 'If the jury believe from the evidence that the plaintiff, by the exercise of ordinary prudence and foresight, could have observed the approach of the train, then he cannot recover, ^{Same-Contributory Negligence-Statute.} and their verdict must be for the defendant.'

No reference is made in the charge to said request, and it is submitted that the presiding judge erred in not charging said request." This request was obnoxious to the law in two particulars: (1) It contained a charge upon the facts; and (2) it deprived the plaintiff of the right he had to recover damages unless he was guilty of gross negligence, as provided by the statute hereinbefore mentioned. It is the judgment of this court that the judgment of the circuit court be affirmed.

Bradley v. Ohio River & C. Ry. Co

BRADLEY

v.

OHIO RIVER & C. RY. CO.

(*Supreme Court of North Carolina, May 29, 1900.*)

Injury to Passenger after Alighting—Negligence—Crossings—Customs—Evidence.—In an action for the death of a passenger caused by the backing of the train, after she had alighted, and was crossing the track in its rear in a hack, it was competent to prove the custom of the defendant railroad as to where it stopped its train and discharged its passengers, and the custom of defendant and the public in using the crossing where the passenger was killed.

Crossings—Customs.*—A crossing over railroad tracks which the public have been habitually permitted to use is treated in law as a public highway crossing.

Evidence.—In such action, it was competent to prove that the conductor in charge of such train knew of the custom of hackmen crossing at such point after his train had passed it, and that he had notified the witness, who was foreman of the stables employing the hackman, that hacks could pass at that crossing after the train had once cleared it, and that the latter had so notified the hackman who drove deceased.

Same—Res Gestæ.—In such action, evidence tending to show that the hack and the body of deceased's daughter, who was injured at the same time, were pushed back by the train, was admissible as part of the *res gestæ*, and tending to show what stopped the train, defendant claiming that the train could not have been stopped so soon if it had been detached from the engine, and "kicked" back, as plaintiff contended.

Hearsay Evidence.—Testimony for defendant to show that another one of his witnesses had made certain statements, not testified to by him on the stand, was properly rejected as hearsay.

Issues.—The framing of the issues is to a great extent left to the sound discretion of the trial judge.

Instructions.—The court is not required to use the exact language of the prayer.

Crossings—Failure to Give Signals.†—Where the failure to give signals before backing a train over a crossing which the public have

*See notes, 13 Am. & Eng. R. Cas., N. S., 766.

†See note, 12 Am. & Eng. R. Cas., N. S., 372 *et seq.*

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been habitually permitted to use as such by the railroad results in the death of a person using the crossing with ordinary care, the railroad is liable for the death.

Instructions.—Under the North Carolina system of issues being submitted, a general prayer that “the plaintiff cannot recover” should not be granted.

Same—Negligence.—A prayer leaving out material circumstances and requesting that the jury be instructed that certain isolated facts would not be negligence was properly refused.

Same.—A prayer assuming the existence of a fact not established by uncontradicted evidence was properly refused.

Signals—Question for Jury.²—Whether the sounding of the whistle when the train was 50 feet from the crossing was timely was a question for the jury.

Negligence—Definition.—In such action, it was not error to instruct that negligence is “the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation; the omission to use means reasonably necessary to avoid injury to others.”

Instructions.—It is not error to refuse to instruct on a point already covered by an instruction given.

Lookout.†—It is the duty of a railroad to maintain a lookout along the track, on a moving train, even where there is no crossing, and a failure to do so resulting in the death of a person on the track is negligence.

“Kicking Cars”—Due Care.‡—The same degree of care to avoid injuring persons on the track is required in “kicking cars” as in making a “flying switch”; and it is gross negligence to do either across a highway when no one is in charge of the detached cars.

Hackmen—Imputable Negligence.§—Negligence on the part of the hackman was not imputable to deceased unless she assumed to direct or control him.

APPEAL by defendant from McDowell county superior court. *Affirmed.*

P. J. Sinclair and Locke Craig, for appellant.

E. J. Justice and S. J. Ervin, for appellee.

²See note, 12 Am. & Eng. R. Cas., N. S., 376 *et seq.*; note, 15 Am. & Eng. R. Cas., N. S., 173 *et seq.*

†See note, 12 Am. & Eng. R. Cas., N. S., 374; note, 11 Am. & Eng. R. Cas., N. S., 80.

‡See note, 12 Am. & Eng. R. Cas., N. S., 500.

§See *Faust v. Philadelphia & R. Ry. Co. (Pa.)*, 15 Am. & Eng. R. Cas., N. S., 146 and *foot-note*.

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CLARK, J. The plaintiff's intestate, Mrs. Kanipe, was a passenger on the defendant's road, who had just gotten off the train at Henrietta station. She took passage on the hack of one Higgins to go to Henrietta Mills. It was necessary to cross the railroad track a few yards in rear of the train from which she had just alighted. The train backed, but was concealed from view by a line of box cars on a side track; and the backing train ran over the hack, killing Mrs. Kanipe. The jury found that the intestate was killed by the negligence of the defendant in backing its cars on the crossing without giving timely signals, and without keeping a reasonable lookout, and "kicking" its cars back over the crossing without reasonable and proper means to stop the train in case of danger; that the intestate was not guilty of contributory negligence,—and assessed the amount of damages. Appeal by defendant.

Exceptions 1-5, 7, and 10 to evidence, and 2, 3, and 5 to the charge, present the question whether it is competent to prove the custom of the defendant as to where it stopped its train and discharged its passengers, and the custom of the defendant and the public in using the crossing where the plaintiff's intestate was killed. This was competent, both upon the question of negligence of the defendant in backing its train, as to the notice to be given, and whether the intestate was guilty of contributory negligence in attempting to cross. "A crossing which the public have been habitually permitted to use" is treated as a public highway crossing. Russell v. Railroad Co., 118 N. C. 1098, 24 S. E. 512, and cases cited. The evidence showing that it was the custom of the company never to back its trains over this crossing after passing it was material in determining what degree of care was required when backing contrary to custom, and in showing that the intestate had a right to rely upon the custom of the company not to back its train (Blackwell v. Railroad Co., 111 N. C. 151, 16 S. E. 12, 17 L. R. A. 729), unless notice was given.

Injury to Passenger after Alighting—Negligence—Crossings—Customs—Evidence.

Crossings—Customs.

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Exceptions 8 and 9 were to evidence that the conductor in charge of this train knew of the custom of hackmen crossing at this crossing after his train had passed it, and that he had notified the witness, who was foreman of the stables employing the hackman, that hacks could pass at that crossing after the train had once cleared it, and that the latter had so notified the hackman who drove Mrs. Kanipe. The evidence was competent and pertinent.

Evidence.

Exceptions 6, 13, and 14 to evidence are clearly without merit, and need no discussion.

Exceptions 11 and 12 were to the admission of evidence tending to show that the hack and the body of Miss Kanipe, who was injured at the same time, were pushed back by the train. The evidence was offered, and, the judge stated, was admitted only as a part of the *res gestæ*, as evidence tending to show what stopped the train; that it was detached from the engine, "kicked back," and was only stopped by this obstruction. The defendant's contention was that the train could not have been stopped so soon if the engine had been (as plaintiff alleged) detached.

Same—*Res Gestæ*.

Exception 15 is to the rejection of proposed testimony by the witness Horne as to statements made by one Coxe, who had testified for the defendant. So far as he corroborated Coxe, by showing that he had theretofore made similar statements to his testimony on the stand, the testimony was competent, and was admitted by the court; but when the defendant wished to go further, to show other statements made by Coxe, not testified to by him on the stand, it was mere hearsay, and did not come within any exception to the rule which rejects hearsay evidence, and was properly refused.

Hearsay Evidence.

The exceptions to the issues cannot be sustained. The framing of the issues is largely left to the sound discretion of the trial judge. When the issues submitted arise on the pleadings, and every phase of the contention of the parties can be presented thereunder, they are not subject to review. Pretzfelder v. Insurance Co., 123

Issues.

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N. C. 164, 31 S. E. 470, 44 L. R. A. 424; *Willis v. Railroad Co.*, 122 N. C. 905, 29 S. E. 941; *Williams v. Gill*, 122 N. C. 967, 29 S. E. 879.

The defendant's prayers for instructions numbered 1, 3, 5-16, 21, 22, and 24, so far as they were correct, were given, in substance, in the charge. The judge was not required to

Instructions. use the exact language of the prayer. See cases cited in Clark's Code (3d Ed.) p. 539.

In lieu of the twentieth prayer, the court properly charged: "If you find from the evidence that this was a crossing where the public had been habitually permitted to cross,

**Crossings—
Failure to Give
Signals.** and with a sanction and knowledge of the defendant, then it became the duty of the

defendant, before it backed its cars on the crossing, to give signals that it intended to do so, and to give them in time for persons approaching the crossing to avoid the danger; and if the defendant failed to give any signal when it backed its cars upon the crossing, or failed to give them in time to warn a person who was in the exercise of ordinary care, and the killing followed as a direct result, then it was a negligent act, and you should answer the first issue, 'Yes.' " Prayers for instructions numbered 2 and 4

were that there was no evidence to support the allegations therein contained, and the plaintiff cannot recover thereon. Under our system of issues being submitted, a general prayer that "the plaintiff cannot recover" should never be granted. *Witsell v. Railway Co.*, 120 N. C. 557, 27 S. E.

Instructions. 125, and other cases cited in Clark's Code (3d Ed.) p. 535. Upon the issues found, the court adjudges, as a matter of law, whether the plaintiff shall recover judgment. Besides, in this case the court could not tell the jury that there was no evidence to support the allegation referred to.

Prayers 17 and 18 were that the court should tell the jury that two isolated facts, if facts, would not be negligence. Possibly it would not have been error to have given

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these prayers, though it is the weight of authority that whether a flagman ought to have been at the crossing was a question for the jury. Rail-
Same—Negligence.
way Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. But the court is not called upon to express an opinion upon each isolated fact,—whether it *per se* would be negligence or not; and a failure to do so is not reversible error when, as here, the court has placed before the jury every phase of the circumstances which the defendant contended was true, as a whole, and instructed the jury properly in regard thereto. It is not whether any single, disconnected fact, taken alone, would or would not be negligence, but whether any given state of facts which there is evidence tending to prove would justify a certain finding upon the issue named. These two prayers leave out the important surrounding circumstances. It is as if a party were to ask the court to say that \$1 is \$1, that 0 is 0, and another 0 is 0, and therefore to argue that the defendant cannot possibly be indebted to the plaintiff \$100, though the circumstances, taken as a whole, may show that he is entitled to that response upon an issue "whether the defendant is indebted to him, and, if so, how much."

The nineteenth prayer could not have been given; for it assumes as a fact that Mrs. Kanipe could have
Same.
seen the train, when there was contradictory evidence.

As to the twenty-third prayer, whether the sounding of a whistle when the train was 50 feet away was timely was a question of fact for the jury, and
Signals—Question for Jury.
not a matter of law.

The exception to the "charge as given" would, if intended as an exception, be untenable, as "broadside," but it is doubtless stated by the appellant merely as matter of inducement to the 13 specific exceptions to the charge which follow. The first of these is to the
Negligence—Definition.
definition of negligence as "the failure to do what a reasonable and prudent person would ordinarily

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have done under the circumstances of the situation; the omission to use means reasonably necessary to avoid injury to others." This definition is justified by precedent. *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506; 16 Am. & Eng. Enc. Law (1st Ed.) 390. It was used by the judge in *Norton v. Railroad Co.*, 122 N. C., at page 920, 29 S. E. 892, though it was not there excepted to. It may be that a more scientific definition could be framed by a skillful dialectician, but we cannot see that the defendant was prejudiced by the use of the one furnished by the judge.

The matter presented in exceptions 2, 3, and 7 to the charge, taken in connection with the context, is unobjectionable.

The fourth exception is as to matter which is in the defendant's tenth prayer for instruction, and as to which it has erroneously excepted, because not given.

As to the fifth and sixth exceptions to the charge, the law requires those in charge of a moving train to keep a lookout along the track, even where there is no crossing; and, if they could have saved life by proper lookout at a crossing, failure to do so is certainly negligence.

Lookout.

Pharr v. Railway Co., 119 N. C. 756, 26 S. E. 149; *Deans v. Railroad Co.*, 107 N. C. 686, 12 S. E. 77; 8 Am. & Eng. Enc. Law (2d Ed.) 293, notes 2, 3.

The eighth, ninth, and twelfth exceptions to the charge cannot be sustained. *Patt. Ry. Acc. Law*, § 167; 2 *Wood, R. R.* 1513; 8 Am. & Eng. Enc. Law (2d Ed.) 397, 398, note 2.

The matter referred to in eleventh exception is a correct statement of the law. 8 Am. & Eng. Enc. Law (2d Ed.) 419, 420, and notes. "Making flying switch" and "kicking cars" are terms denoting very nearly the same thing. In the former, the engine may be in front, and, upon being disconnected, the rear cars may be run upon another track while still rolling. In "kicking cars," the disconnected cars are given their impetus by a backward motion of the engine, which does not follow

"Kicking Cars"—
Due Care.

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them. The same principle of law applies. In *Schindler v. Railway Co.*, 87 Mich. 410, 49 N. W. 674, it is said, "It is gross negligence to kick a car across a highway, unattended." *Kay v. Railroad Co.*, 65 Pa. St. 269; *Railway Co. v. Smith (Ky.)*, 20 S. W. 392, 18 L. R. A. 63; *Railroad Co. v. Baches*, 55 Ill. 379. Here the only person who the defendant contends was on the train was an 18 year old negro, and he was not on the end of the backing train, but says he was between two cars, to put on brakes.

The thirteenth exception to the charge is to the language, "She [Mrs. Kanipe] was not responsible for the conduct of the driver unless she assumed to direct or control him." There was no error in this. *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652; *Railroad Co. v. Powell*, 89 Ga. 601, 16 S. E. 118; *Railroad Co. v. Cooper*, 85 Va. 939, 9 S. E. 321; *Bottoms v. Railroad Co.*, 114 N. C. 699, 19 S. E. 730, 25 L. R. A. 784; *Crampton v. Ivie*, 124 N. C. 591, 32 N. E. 968. In the last-named case two judges dissented, but not upon this point, as to which the court was unanimous.

Hackmen—
Imputable
Negligence.

There are 54 exceptions in this case, all of which have been carefully considered. Only errors which are material and fatal can entitle a party to a new trial, and none which the appellant does not have reasonable ground to think such should be brought to this court. There could be no necessity to show 54 fatal errors in any trial. Counsel, not knowing what will be the views of the court, are the sole judges of what exceptions they shall think proper to bring up for review, but it is not necessary to bring up every exception which through abundant caution is taken on the trial. If, in making up a case on appeal, counsel will sift out and drop those presenting the same points already made by another exception, and those exceptions which have already been held against the appellant in other cases, and harmless errors not justifying a new trial, the number left will still be enough to occupy the time allotted for argument, and will concentrate both the argument of counsel and the attention of

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the court upon the vital points which should determine the appeal. *Pretzfelder v. Insurance Co., supra.* In saying this we are laying down no rule for counsel, who must always decide for themselves what exceptions the interest of their clients shall require them to bring up for review; but we are suggesting that a little more care and discrimination in selecting exceptions to be passed on by this court might in many cases lighten the labors of counsel, as well as of ourselves, and be conducive to the ends of justice, by concentrating attention upon the really vital points of the case. Affirmed.

ADIRONDACK RAILWAY COMPANY

v.

PEOPLE OF THE STATE OF NEW YORK.

(*Supreme Court of the United States, February 26, 1900.*)

Eminent Domain—Execution of Right—Filing Map of Proposed Route—Vested Rights.—Where the only step taken by a railroad towards executing its right to take land by eminent domain is the filing of the map of the proposed route, the state, where it has power to alter, suspend, and repeal the company's charter, may take such land for its own purposes, without giving the railroad an opportunity to contest the legality of the taking, and without provision for its compensation.

ERROR by defendant to the circuit court of appeals of the state of New York. *Affirmed.*

Statement by MR. CHIEF JUSTICE FULLER:

This is a writ of error to a judgment of the court of appeals of the state of New York affirming a final judgment of the supreme court of New York perpetually enjoining the Adirondack Railway Company from taking certain lands by condemnation proceedings. The People of the State of New York brought the action, and obtained judgment at a special

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term of the supreme court, which was reversed by the appellate division, 39 App. Div. 34, 56 N. Y. Supp. 869, whose order was in turn reversed by the court of appeals, and the original judgment affirmed. 160 N. Y. 225, 54 N. E. 689.

The case is thus stated in the opinion of the court of appeals by VANN, J. :

"In 1882 the Adirondack Railway Company was incorporated for the term of one thousand years to construct and operate a railroad from Saratoga Springs to the river St. Lawrence, near the city of Ogdensburg. It was a reorganization of an older corporation known as the Adirondack Company, which was organized in 1863, under the provisions of chapter 236 of the laws of that year. Prior to the foreclosure which resulted in the reorganization, the Adirondack Company had constructed a railroad from Saratoga Springs to North creek, in the county of Warren, and this railroad, together with the right to extend the same, became the property of the Adirondack Railway Company, which, in April, 1892, applied to the railroad commissioners for a certificate, under chapter 565 of the Laws of 1890, to relieve it from the statutory obligation of extending its lines; on the 9th of May following, the commissioners issued their certificate accordingly. The Adirondack Railway Company, thenceforth called the defendant, made no attempt to extend its road until the early part of 1897, when a survey was made for a proposed extension from North creek through the counties of Warren, Hamilton, and Essex, to the outlet of Long lake in Hamilton county, where it was expected that, by connecting with other roads, a route would be secured to the St. Lawrence river. Before anything further was done to extend the road, certain action, taken by the state, should be briefly alluded to.

"In 1885 the forest preserve was created by statute, embracing 'all the lands now owned, or which may be hereafter acquired, by the state of New York within' certain counties, and the area was extended by subsequent legislation. Laws 1885, chap. 283; Laws 1887, chap. 639; Laws

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1893, chap. 332. These acts required said lands to be forever kept as wild forest lands, and provided that they should not be sold, leased, or taken by any corporation, public or private. A forest commission with appropriate powers was created to care for the forest preserve, and appropriations were made from time to time to enable it to properly discharge its duties.

"In 1890 the forest commission was authorized to 'purchase lands so located within such counties as include the forest preserve, as shall be available for the purposes of a state park,' and in 1892 the Adirondack park was established and placed under the control of said commission. Laws 1890, chap. 37; Laws 1892, chap. 707.

"The revised Constitution, which went into effect on the 1st of January, 1895, provides that 'the lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold, or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed, or destroyed.' Const. art. 7, § 7.

"In 1895 the legislation relating to the forest preserve and the Adirondack park was extended by the fisheries, game, and forest law, and it was declared by § 290 that 'such park shall be forever reserved, maintained, and cared for as ground open for the free use of all the people for their health and pleasure, and as forest lands necessary to the preservation of the headwaters of the chief rivers of the state, and a future timber supply; and shall remain part of the forest preserve.' Laws 1895, chap. 395, §§ 270, 295. During the same year the forest commission was authorized to purchase 80,000 acres for the use of the Adirondack park. Laws 1895, chap. 561. In 1897 an act was passed, the object of which, according to its title, was 'to provide for the acquisition of land in the territory embraced in the Adirondack park, and making an appropriation therefor.' Laws 1897, chap. 220. By this act the appointment of a forest preserve board was

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authorized, and it was made its duty 'to acquire for the state, by purchase or otherwise, land, structures, or waters, or such portion thereof in the territory embraced in the Adirondack park, as defined and limited by the fisheries, game, and forest law, as it may deem advisable for the interests of the state.' Section 3 of said act provides that 'the forest preserve board may enter on and take possession of any land, structures, and waters in the territory embraced in the Adirondack park, the appropriation of which in its judgment shall be necessary for the purposes specified in § 290 of the fisheries, game, and forest law, and in § 7 of article 7 of the constitution.' It is provided by the next section that 'upon the request of the forest preserve board an accurate description of such lands so to be appropriated shall be made by the state engineer and surveyor, or the superintendent of the state land survey, and certified by him to be correct, and such board, or a majority thereof, shall indorse on such description a certificate stating that the lands described therein have been appropriated by the state for the purpose of making them a part of the Adirondack park; and such description and certificate shall be filed in the office of the secretary of state. The forest preserve board shall thereupon serve on the owner of any real property so appropriated a notice of the filing and the date of filing of such description, and containing a general description of the real property belonging to such owner which has been so appropriated; and from the time of such service, the entry upon and appropriation by the state of the real property described in such notice for the uses and purposes above specified shall be deemed complete, and thereupon such property shall be deemed and be the property of the state. Such notice shall be conclusive evidence of an entry and appropriation by the state. § 4. Provision is made by the next section for the payment for lands so taken, and for damages resulting from the appropriation by agreement with the owner and the delivery of a certificate payable by the state treasurer upon the warrant of the comptroller. § 5. If the forest preserve

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board is unable to agree with the owner upon the value of the property appropriated, the owner, within two years after the service upon him of the notice of appropriation, may present a claim for the value of the land to the court of claims, which has jurisdiction to hear and determine the same and to render judgment thereon. The amount of the final judgment is payable by the treasurer upon the warrant of the comptroller. § 6. No provision is made by the act for the payment of any lien upon the lands except that when a judgment for damages is rendered, and it appears that there is a lien or encumbrance upon the property appropriated, the amount thereof shall be stated in the judgment, and the comptroller may deposit the amount awarded in the proper bank to be paid and distributed to the person entitled to the same as directed by the judgment. § 19. The sum of \$600,000 was appropriated for the purposes specified in the act, and the comptroller was authorized to borrow \$400,000 more upon the request of the forest preserve board to be expended under its direction.

"On the 6th of August, 1897, after certain negotiations with the owners of a part of an extensive tract of land known as the Totten & Crossfield purchase, the forest preserve board passed a resolution accepting the offer of the owners of about 18,000 acres of township 23, and 32,000 acres of township 15 of that purchase for the sum of \$149,000, of which \$99,000 was for the land and \$50,000 was for certain improvements at Indian lake for the use of the state, to be made in accordance with the plans and specifications to be furnished by the state engineer. Township 15 of the Totten & Crossfield purchase lies, as is admitted in the answer, 'wholly within the bounds of the forest preserve and also of the Adirondack park.' Upon the 15th of August, 1897, a representative of the state engineer with a surveying party began surveying at Indian lake for the purpose of constructing a dam at its mouth in order to stow water for the use of the Champlain canal and for water power on the Hudson river. Upon the completion of the survey plans and

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specifications were prepared and the construction of the dam was commenced.

"September 18, 1897, the defendant caused a map and profile to be filed in the counties of Hamilton, Warren, and Essex for the extension of its road across township 15, which the forest preserve board had agreed to purchase as aforesaid, and which lies partly in each of said three counties. It also gave notice of such filing to the occupants as required by statute, but did nothing else. About the 1st of October following, as the owners were about to convey to the state the lands covered by the resolution of August 6, and receive their money, they were restrained from so doing by an injunction issued in an action brought by the Adirondack Railway Company against them. Thereupon they placed the deed in escrow to be delivered when the injunction was dissolved, made another deed embracing the same premises, except the land described in the railroad survey, delivered it to the forest preserve board, and received the \$99,000, according to agreement. Immediate steps were taken to vacate the injunction, but they were not at first successful, and on the 7th of October the forest preserve board met, and, learning that the justice who granted the injunction had declined to vacate it, they took steps to appropriate the land in question for a park under the power of eminent domain. The state engineer having furnished a description in writing of the 6-rod strip, which the defendant desires for a railroad, and certified that the same was correct, the three members of the forest preserve board, acting under chapter 220 of the Laws of 1897, annexed thereto a certificate of condemnation and signed the same as the forest preserve board, in these words: 'State of New York, county of Albany, city of Albany, ss. We, Timothy L. Woodruff, Charles H. Babcock and Campbell W. Adams, being the forest preserve board, acting under and in pursuance to an act of the legislature of the state of New York, being chapter 220 of the Laws of 1897, entitled "An Act to Provide for the Acquisition of Land in the Terri-

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tory Embraced in the Adirondack Park and Making an Appropriation Therefor," do hereby certify that the lands in township 15, Totten & Crossfield purchase, in the counties of Hamilton, Essex, and Warren, of the state of New York, described in the foregoing certificate of the state engineer, have been and hereby are duly appropriated by the state of New York for the purpose of making them a part of the Adirondack park.' These papers, indorsed 'State engineer's certificate and description and forest preserve board's certificate of condemnation,' were filed in the office of the secretary of state on the 7th of October, 1897. On the same day a notice of this action of the board with a general description of the property appropriated and a copy of the papers above mentioned, were served on William McEchron, the president of the Indian River Company, which then owned the lands involved. This service was made, as the special term is presumed to have found, at ten minutes before noon. On the same day the defendant began proceedings to condemn said strip for the purpose of extending its railroad, but, as the special term is also presumed to have found, they did not file the *lis pendens* until afternoon, and hence not until after the aforesaid proceeding in behalf of the state had been completed. No notice of condemnation was served on the defendant.

"On the 2d of March, 1898, the injunction restraining the conveyance of said lands to the state was reversed on appeal by the appellate division, and thereupon the original deed in escrow was delivered and recorded. The defendant went on with its condemnation proceedings until it was restrained by a temporary injunction granted in this action, which was brought to restrain that company and the other defendants from further continuing the proceedings to condemn.

"The defendant alone answered, and after a trial the special term rendered judgment for the people, perpetually enjoining it from taking the land. Upon appeal the judgment was reversed by the appellate division and a new trial ordered, by a divided vote, upon the ground that the com-

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pany, by the filing of its map on the 18th of September, had impressed upon the land a lien that was good as against the state of New York. The people have appealed to this court, giving the usual stipulation for judgment absolute."

Mr. R. Burnham Moffat, for plaintiff in error.

Mr. Edward Winslow Paige, for defendant in error.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court:

The court of appeals ruled that on the record it must be presumed that all the facts warranted by the evidence and necessary to support the judgment were found by the courts below; that it was to be assumed that the condemnation proceedings instituted by the forest preserve board were fully completed as required by the statute of 1897 before proceedings to condemn on its part were commenced by the railroad company; and that, thereby, if the condemnation act under which the board proceeded was valid, title to the strip of land in question passed to the state, became a part of the forest preserve, and the railroad company was forbidden by the Constitution to take it. The court sustained the validity of the law, and, without discussing "whether the state became the equitable owner through contract, possession, and performance," held that "it became the legal owner through the power of eminent domain."

Plaintiff in error contends, in substance: that it possessed by contract a vested right to construct its road over the 6-rod strip in question, and to take that strip by the exercise of the power of eminent domain, and that the condemnation features of the act of 1897, as construed by the court of appeals, are void because impairing the obligation of the contract; that the condemnation features of the act as construed to confer authority on the state to acquire, by the proceedings in question, title to the 6-rod strip are unconstitutional and void in that they authorize the taking from plaintiff in error its vested property right to construct, maintain, and operate its railroad over said strip, "without any notice whatsoever or opportu-

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nity to be heard, and without the making of any compensation therefor;" that the proceedings authorized by the act of 1897 do not constitute due process of law.

Section 1 of article VIII. of the Constitution of New York authorized the formation of corporations under general laws, and by special act (for municipal purposes and) in cases where in the judgment of the legislature the objects of the corporation could not be attained under general laws, but provided that "all general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

The Adirondack Company was organized in 1863 under the general railroad law of New York of April 2, 1850, which reserved the right of the legislature to "at any time annul or dissolve any incorporation formed under this act."

The Revised Statutes, in force from 1829 to 1882, provided: "The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension, and repeal, in the discretion of the legislature."

By an act of March 31, 1865, the Adirondack Company was authorized to "amend its articles of association so as to enable it, under the general law, to extend its railroad to some point on Lake Ontario or river St. Lawrence."

April 25, 1867, the railroad law of April 2, 1850, was amended so as to provide that if corporations formed under the act should not within five years after the filing and recording of its articles of association commence construction or finish its road and put it in operation within ten years, its corporate existence and powers should cease.

In 1882 the railroad of the Adirondack Company extended from Saratoga Springs to North creek, and in that year the Adirondack Railway Company acquired all the rights of the Adirondack Company, and, under the reorganization laws of New York, organized itself with a life of a thousand years.

The 83d section of the railroad law of June 7, 1890, provided as follows [chap. 565]: "A railroad corporation, reorganized under the provisions of law, relating to the formation

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of new or reorganized corporations upon the sale of their property or franchise, shall not be compelled or required to extend its road beyond the portion thereof constructed, at the time the new or reorganized corporation acquired title to such railroad property and franchise, provided the board of railroad commissioners of the state shall certify that in their opinion the public interests under all the circumstances do not require such extension. If such board shall so certify, and shall file in their office such certificate, which certificate shall be irreversible by such board, such corporation shall not be deemed to have incurred any obligation so to extend its road, and such certificate shall be a bar to any proceedings to compel it to make such extension, or to annul its existence for failure so to do, and shall be final and conclusive in all courts and proceedings whatever. This section shall not authorize the abandonment of any portion of a railroad which has been constructed or operated or apply to Kings county.''

On the 9th of May, 1892, on the application of the Adirondack Railway Company, the board of railroad commissioners issued its certificate, certifying that in its opinion the public interests, under all the circumstances, did not require the extension of the road of the Adirondack Railway Company beyond the portion thereof constructed at the time the said company acquired title to said railroad property and franchises, namely, beyond North creek, in the county of Warren.

Counsel argue that the contract with the state was that plaintiff in error should avail itself of the grant and complete the road within ten years from the filing of its articles of association, or forfeit its existence and powers; that this was one of the conditions of the contract; that it was perfectly competent for the state to release the other party from the fulfilment of such condition without in any way withdrawing its own grant if it chose to do so; and that this was the sole effect of the application for and the obtaining of the certificate. In other words, that the Adirondack Railway Com-

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pany was released from the obligation to extend its road, but retained the right to do so at any time within nine hundred and ninety years, and that although the company still possessed and operated the road so far as constructed, and had asked and received a dispensation from carrying its enterprise further except as it might choose during the passage of centuries, the state was bound by contract not to withdraw the bare right, notwithstanding the contract, according to its express terms, might be changed or abrogated. Undoubtedly the power to amend or repeal cannot be availed of to take away property already acquired or to deprive a corporation of the fruits already reduced to possession of contracts lawfully made. But the capacity to acquire land by condemnation for the construction of a railroad attends the franchise to be a railroad corporation, and when unexecuted cannot be held to be in itself a vested right surviving the existence of the franchise or an authorized circumscription of its scope. *People ex rel. Schurz v. Cook*, 148 U. S. 397, 37 L. Ed. 498, 13 Sup. Ct. Rep. 645; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 40 L. Ed. 838, 16 Sup. Ct. Rep. 705; *Bank of Commerce v. Tennessee for use of Memphis*, 163 U. S. 424, 41 L. Ed. 214, 16 Sup. Ct. Rep. 1113. But it is said that by the filing of the map across township 15 and the service of its notices, the railroad company so far exerted its capacity to extend and construct as to secure rights in the strip of land which could not be taken at all, or, if so, not without compensation. The railroad law provided that companies formed under it before constructing any part of their road into or through any county named in their articles of association should make a map and profile of the route intended to be adopted, file the same in the office of the clerk of the county in which the road was to be made, and give written notices to all actual occupants of the route so designated, and that any party feeling aggrieved by the location might within fifteen days after receiving notice apply to a justice of the supreme court, by petition, who could affirm or alter the proposed route in such manner as might

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be consistent with the just rights of all parties and the public. The Code of Civil Procedure provided for proceedings to be taken to acquire title to real property for a public use by condemnation. In this case the railroad company filed its map on September 18 and served its notices September 23, 1897. The Forest Preserve Board on August 6, 1897, had accepted an offer by the owners of lands, over which the route was projected, and conveyance thereof was about to be delivered, when on September 30, 1897, an injunction was granted at the suit of the railway company restraining the owners from conveying. The fifteen days for objections to the proposed route prescribed by the railroad law had not then expired. The state condemned October 7, and on the same day, but subsequently, the company commenced proceedings to condemn under the Code. The court of appeals held that assuming that the filing of the map created a lien, or something in the nature of a lien, as this was by statute and not by contract, it could be done away with by statute without liability to make compensation, unless some vested right had accrued under it. The court further held that no lien nor any right in the nature of a lien could be created as against the state by the mere filing of a route map under the railroad law; that the filing established no right against the owners, because that would be in violation of the constitution; and that it established none against the state because the power of the state was paramount. But the court was of opinion that, as against all other railroad companies, and as against all other creatures of the state empowered to use the right of eminent domain, "it gave the exclusive right to occupy the particular strip of land for railroad purposes until the legislature authorized it to be devoted to some other public use." And the court said: "The claim that a lien, good as against the creator of the corporation, was placed upon the land simply by the grant of a franchise to exist as a corporation in order to build a road, followed by the filing of a map of the proposed route and notice thereof to the occupants, but by nothing else, cannot be sustained. There

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is no property in a naked railroad route existing on paper only, that the state is obliged to pay for when it needs the land covered by that route for a great public use, and its officers are authorized to act by appropriate legislation."

In arriving at these conclusions the court of appeals was construing and applying the laws of the state of New York, and we perceive no adequate ground for declining to accept its views in accordance with the general rule on that subject. In any view, we think that the proceedings on the part of the state impaired the obligation of no contract between it and the railway company.

Counsel concedes that the sovereign power of eminent domain is inherent in government as such, requiring no constitutional recognition, and is as indestructible as the state itself; and "that all private property, tangible and intangible, is held subject to the exercise of the right by the sovereign power, even that which may already be devoted to a public use."

It is insisted, however, that the constitutional limitations on the exercise of the power, though conditions merely and not part of the power itself, require that the owner shall have an opportunity to contest the legality of the taking, and that ultimate payment of just compensation must be secured.

And the constitutionality of the act of 1897 is attacked as authorizing the deprivation of property without due process of law, and the taking thereof without provision for compensation.

The forest preserve was created by an act of May 15, 1885 [chap. 285], and consisted of "all the lands now owned or which may hereafter be acquired by the state of New York" within the counties of Essex, Warren, Hamilton, and other counties.

Section 8 read: "The lands now or hereafter constituting the forest preserve shall be forever kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private." The forest commission was created by the act, and in 1890 was author-

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ized to "purchase lands so located within such counties as include the forest preserve, as shall be available for the purposes of a state park," and an appropriation was made for that purpose. By an act of May 20, 1892 [chap. 707], the Adirondack park was established in the counties of Hamilton, Herkimer, St. Lawrence, Franklin, Essex, and Warren, was made part of the forest preserve, and declared to be "forever reserved, maintained, and cared for as ground open for the free use of all the people for their health or pleasure, and as forest lands necessary to the preservation of the headwaters of the chief rivers of the state, and a future timber supply," and the forest commission was given power to contract for the purchase of land subject to restrictions therein mentioned. Laws on the subject of this park were passed in 1893, 1894, and 1895, and in the latter year a new state Constitution came into effect, of which section 7 of article VII. was as follows: "The lands of the state now owned or hereafter acquired, constituting the forest preserve, as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold, or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed, or destroyed."

Then came the act of 1897 [chap. 220] creating the forest preserve board, which was empowered to acquire for the state by purchase or otherwise such "lands, structures, or waters" within the limits of Adirondack park as might be deemed advisable for the interests of the state, and to enter thereon and take possession thereof.

By section 4 it was provided that when the board should have determined to appropriate certain lands, the state engineer should furnish it with an accurate description thereof certified by him to be correct; that a majority of the board should indorse on such description a certificate setting forth that the lands specified had been appropriated by the state for the purpose of making them a part of Adirondack park, which description and certificate should thereupon be filed in the office of the secretary of state; that the board

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should then serve on the owner of the property so appropriated a notice setting forth the fact of such filing, the date of filing, and a general description thereof; and that "from the time of such service the entry upon and appropriation by the state of the real property described in such notice for the uses and purposes above specified shall be deemed complete, and thereupon such property shall be deemed and be the property of the state. Such notice shall be conclusive evidence of an entry and appropriation by the state."

Under the 6th section the owner, if unable to agree with the board on the value of the property appropriated or the amount of damages resulting from such appropriation, might within two years after the service upon him of the notice of appropriation, present to the court of claims a claim for the value of the land and for damages, and the court of claims shall have jurisdiction to hear and determine such claims and render judgment thereon, provision being made for the payment of such judgment.

By the 19th section it was provided that when a judgment for damages was rendered, "and it appears that there is any lien or encumbrance on the property so appropriated, the amount of such lien shall be stated in the judgment, and the comptroller may deposit the amount awarded to the claimant in any bank in which moneys belonging to the state may be deposited, to the account of such judgment to be paid and distributed to the person entitled to the same as directed by the judgment."

The lands taken for the park were thereby dedicated to a public use regarded by the state as of such vital importance to the people that they were expressly put by the Constitution beyond the reach of any other destination. The general rule is that the necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance, but one for the determination of the legislative branch of the government, and this must obviously be so where the state takes for its own purposes. The state possesses the power as a sovereign, and as a sovereign exerts it.

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How can its citizens call on the courts to review the grounds on which the state has acted in the absence of legislation permitting that to be done?

It is true that the state may delegate the power, and where it has done so to a railroad corporation, and by its exercise lands have been subjected to a public use, they cannot be applied to another public use without specific authority, expressed or imperatively implied, to that effect. But the sovereign power of the state cannot be alienated, and where exercised is exclusive.

In this case the use for the park was in itself inconsistent with the use for railroad purposes, and the legislation and the Constitution alike forbade this company to acquire for its use any portion of that which the state had taken for its own exclusive and designated purposes.

Compensation must indeed be made, and inquiry as to its amount in some appropriate way, before some properly constituted tribunal, must be provided for (*Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 42 L. Ed. 853, 18 Sup. Ct. Rep. 445); and it is the rule in New York that where this is done, and a certain, definite, and adequate source of payment is provided, compensation need not actually be made in advance of a taking by the state or one of its municipal subdivisions. *Re New York*, 99 N. Y. 569, 2 N. E. 642; *Sweet v. Rechel*, 159 U. S. 400, 40 L. Ed. 196, 16 Sup. Ct. Rep. 43.

This act fulfils these requirements in that the state treasury is the source of payment, and an appropriate mode is designated for the ascertainment of compensation as to owners and those holding liens and incumbrances. In providing for notice to owners only, the act seems to contemplate that it will appear in the progress of the proceedings to ascertain compensation whether there are out standing claims, and that such claimants may thereupon come forward and be heard.

We need not discuss the sufficiency of the provision in this respect, since we agree with the court of appeals, as has

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already been indicated, that the railroad company occupies no position entitling it to raise the question. The steps it had taken had not culminated in the acquisition of any property or vested right; and no contract between it and the state was impaired, nor was due process of law denied to it within the meaning of the Constitution of the United States under the circumstances disclosed on this record.

Judgment affirmed.

MOBILE & O. R. Co.

v.

POSTAL TEL. CABLE CO.

(*Supreme Court of Mississippi, March 15, 1899.*)

Condemnation of Right of Way for Telegraph Line—Damages.*—Where only such portion of a railroad right of way as is necessary for a telegraph line is condemned for such purpose, the measure of damages is not the value of the land embraced between the poles and under the wires, but the extent to which the value of the use of such spaces by the railroad is diminished by their use by the telegraph company.

Same—Speculative Damages.—The possibility that the railroad may change its route and not use its right of way as such, but for other purposes, cannot be considered in awarding damages for the condemnation of a portion of the right of way for a telegraph line.

Same—Same.—Nor is the possibility that the railroad may, in the future, conclude to lay other tracks, or side tracks, an element of damages for such a condemnation, where the telegraph company has stipulated to move its poles, in case of such an event, to another point or points on the right of way, upon reasonable notice, and at its own expense.

Same—Effect of Grant to Other Telegraph Company.—A railroad company cannot grant an exclusive right to construct a telegraph line upon its right of way.

APPEAL by defendant from Chickasaw county circuit court.
Affirmed.

*See notes at end of case.

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Bristow & Sykes, for appellant.*J. R. McIntosh*, for appellee.

WHITFIELD, J. The only question of importance in this case is, what is the true measure of damages in cases of this character? In *St. Louis & C. Ry. Co. v. Postal Tel. Co.*, 173 Ill. 508, 51 N. E. 382, —a case almost identical with this, —that court, in the course of an ably-reasoned opinion, said: "The measure of damages theretofore suffered by the railroad company is not the value of the land embraced within the right of way between the poles and under the wires, but the measure of damages is the extent to which the value of the use of such spaces by the railroad company is diminished by the use of the same by the telegraph company for its purposes,"—citing *Chicago, B. & Q. R. Co. v. City of Chicago*, 149 Ill. 457, 3 Am. & Eng. R. Cas., N. S., 158, 37 N. E. 78, and *Id.*, 166 U. S. 226, 7 Am. & Eng. R. Cas., N. S., 26, 17 Sup. Ct. 581. Again, the court says: "The spaces over which the wires are strung from pole to pole are not taken by the telegraph company. Such damage as the construction and operation of the telegraph line causes to the spaces between the poles the appellants are entitled to recover. The telegraph company does not acquire by the judgment of condemnation the fee to any portion of the right of way. Any construction which holds that it does acquire the fee is not sanctioned by the language of the act in relation to telegraph companies. The act does not confer the right to use the land condemned for any other purpose than for telegraph purposes. The company cannot take possession of it or use it for any other purpose than to erect telegraph poles, and to suspend wires upon them, and to maintain and repair the same. The company will have the right to enter upon that portion of the right of way which is between the telegraph poles and under its wires for the purpose of repairing its lines. But the telegraph company acquires no right to exclude the railroad company from the use of the land. The ownership of the railroad company remains as it was before, while the telegraph company merely acquires an ease-

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ment upon what it condemns for the purpose of entering thereon in order to erect and repair the line." *St. Louis & C. R. Co. v. Postal Tel. Co.* (1898), 173 Ill. 508, 51 N. E. 382. In this case that court sustained a judgment for nominal damages, and that court said: "This is simply a case where the railroad is not using the space occupied by the posts and wires, and where it cannot convey it to another for any purpose, in which only nominal damages arise." In that case nominal damages only were awarded to the railroad company in a condemnation proceeding by the telegraph company for the right to construct, maintain, and operate its telegraph lines along and upon the right of way of the railroad. There were two causes at the same time before the court on appeal by the railroad company between the same parties, and involving the same question. Under the statutes of Tennessee, a separate condemnation proceeding was required by the telegraph company in each circuit court district through which the road ran; hence there were two causes appealed from two separate circuit court districts, which were heard by the supreme court together. The court said: "The causes are before us on appeal by the railroad company, but the real party in interest is the Western Union Telegraph Company, a competing line, with which the railroad has a contract for an exclusive line over its right of way, and which has a right, under its contract, to use the name of the railroad company in any suit to resist the attempt of any competing line to construct any other lines upon its right of way." Again, this court says: "It does not acquire any estate in fee. It only acquires an easement or right of way, and this only for railroad purposes. While its right of way extends to a certain distance on each side of its track, it has no right to occupy the way beyond its track, cuts, and fills, or to such distance and to such an extent only to maintain its track, and operate its trains. It can only go beyond these limits for necessary railroad purposes. It cannot sell, transfer, incumber, or use its right of way, except as its necessities and conveniences may demand for the proper operation

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of its road. It cannot license the appropriation of any part of such right of way to private business purposes nor to public purposes, except so far as needful and helpful to the operation of the road itself. Jones, Easem. § 383. Its right of way can, therefore, have no market value, because it cannot be placed upon the market, either by private sale or public outcry. A railroad company is entitled to have a right of way by process of condemnation, because it is a work of internal improvement, —a quasi public use. But it has been held that the land already taken by the exercise of eminent domain for public use, and actually used for that purpose, may be taken by legislative authority for other public uses not inconsistent with or destructive to the former use. Mills, Em. Dom. § 45, and cases there cited. It is not insisted in this case that the use of the right of way and construction of the telegraph lines will be any detriment or obstruction to the railroad, but, on the contrary, it is shown it would be a benefit and convenience. A telegraph line along a railroad is not only a convenience, but a necessity, and is very properly treated as a railroad appurtenance. A railroad company may therefore construct a telegraph line along its right of way, or permit another to do so; but it acquires and can confer no exclusive right to do so. W. U. Tel. Co. v. Baltimore & O. Tel. Co., 19 Fed. 660; W. U. Tel. Co. v. Burlington & S. W. R. Co., 11 Fed. 1; W. U. Tel. Co. v. American Union Tel. Co., 38 Am. Rep. 781; Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 124; 3 Am. & Eng. Enc. Law (1st Ed.) pp. 885, 886. Under this view of the estate and interest which railroad companies have in their right of way, it is difficult to see how the damages sustained by the road can be anything but nominal. * * * It is said with much earnestness, and with some degree of plausibility, that it would be unjust to allow a telegraph company to plant its poles along the right of way, when the railroad company had expended thousands of dollars to clear and keep it free of obstructions, and yet pay nothing for the privilege. But

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this view is more specious than sound, for the railroad must incur this expense for its own purposes, whether the telegraph line is there or not, and must keep its right of way clear of obstructions, whether it is occupied by a telegraph line or not, and there is no greater burden or expense because of the presence of the telegraph line. The trial judge in the Madison county case held: "The measure of damages to the defendant is the amount of decrease in value of the use of the right of way for railroad purposes when it is jointly used for telegraph purposes." This rule was, no doubt, adopted from the rule laid down by the supreme court of the United States in the case of *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U. S. 248, 17 Sup. Ct. 581."

And the supreme court of Alabama, in the case of *Mobile & O. R. Co. v. Postal Tel. Cable Co.*, 13 Am. & Eng. R. Cas., N. S., 423, 24 South. 408, appealed from the circuit court of Mobile county, JUSTICE HARALSON speaking for the court, said: "This cause is an appeal from the circuit court to review the proceedings of that court in the trial of the cause on appeal from the probate court, where they were instituted, for the condemnation of an easement in favor of the appellee company to construct and operate its line of telegraph over the right of way of appellant company. The case is here on appeal by the railroad company, but the real party in interest, as appears from the proceedings, is the Western Union Telegraph Company, with which the railroads have a contract for an exclusive line over its right of way; and under its contract said telegraph company may use the name of the railroad company to resist the attempt of any other line to construct on the right of way of the railroad any competing telegraph line. * * * In the case before us, a very nominal amount of land constituting right of way is proposed to be taken,—only that part of it occupied by posts, 175 feet apart, leaving the way for all purposes unobstructed. It is really an easement in an easement; a servitude, true, for which the company is entitled to some compensation under the constitution. The railroad company, however, holds its right of way, so far

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as is made to appear, simply for railroad purposes, and is restricted in its use of same for such purposes. Under this view of the estate that the railroad company has in its right of way, it is difficult to see how the damages sustained by the road can be anything more than nominal. Indeed, if we might weigh advantages and disadvantages, a competing line would naturally and reasonably appear to be an advantage to the railroad company. * * * It has not been shown that the company holds the land as a private individual, to devote it to any purposes it pleases, or to sell it, at will, at the highest price it will bring on the market. The land constituting the right of way really has no market value so long as it is used for such purposes. It has been withdrawn by the very uses of the company, from marketable land; and when there can be no market value of land by reason of its use as a part of an extensive business or enterprise, its value must be determined by the use to which it is applied, and necessarily not by any supposed market value it has. *Illinois Cent. R. Co. v. City of Chicago*, 141 Ill. 509, 30 N. E. 1046; *Chicago, B. & Q. R. Co. v. City of Chicago*, 149 Ill. 457, 3 Am. & Eng. R. Cas., N. S., 188, 37 N. E. 78; *Id.*, 166 U. S. 226, 7 Am. & Eng. R. Cas., N. S., 26, 17 Sup. Ct. 581; *Lewis Em. Dom.* § 485. Commenting on the decision of the Illinois case last cited, which was a case for the condemnation of a street across railroad tracks or right of way, the supreme court of the United States, in the case last cited, used language well adapted to the case in hand. They say: "The land, as such, was not taken; the railroad company was not prevented from using it; and its use for all the purposes for which it was held by the railroad company was interfered with, only so far as its exclusive enjoyment for the purpose of railroad tracks was diminished in value by subjecting the land within the crossing to public use as a street. The supreme court of Illinois well said "that the measure of compensation is the amount of decrease in the value of the use for railroad purposes caused by the use for purposes of a street, such use of

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a street being exercised jointly with the use of the company for railroad purposes. In other words, the company is to be compensated for the diminution in its right to use its tracks, caused by the existence and use of the street." ' The supreme court of Illinois held in that case that the trial court did not err in excluding evidence to show the general salable value of the land constituting the right of way included in the crossing, or its general value for other uses than that to which it was applied. The soundness of this principle was approved by the federal court, and it appears to be sustained by reason and authority. 149 Ill. 457, 3 Am. & Eng. R. Cas., N. S., 188, 37 N. E. 78; 166 U. S. 249, 7 Am. & Eng. R. Cas., N. S., 26, 17 Sup. Ct. 581; *Mobile & O. R. Co. v. Postal Tel. Co.* (Tenn. Sup.; April term, 1898; two cases tried and decided together), 8 Am. & Eng. Corp. Cas., N. S., 505, 46 S. W. 571."

We approve the principles announced in these cases, except that we do not say that the damages are merely nominal. We adopt the rule as first above stated in *St. Louis & C. R. Co. v. Postal Tel. Co.*, 173 Ill., at page

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534, 51 N. E. 390, to wit: "The measure of damages, therefore, suffered by the railroad company, is not the value of the land embraced

within the right of way between the poles and under the wires, but the measure of damages is the extent to which the value of the use of such spaces by the railroad company is diminished by the use of the same by the telegraph company for its purposes." This is the true measure of damages in

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Speculative
Damages.

cases of this character. In respect to the proposition that the railroad company might, in future, possibly change its route (whether with

or without legislative permission), and, in the future, "use the lands for purposes other than a right of way," that this possible use should be taken into account as an element of damages, MR. JUSTICE HARLAN, speaking for the United States supreme court, said (166 U. S., at page 249, 17 Sup. Ct. 590); "Such a possibility was too remote and contin-

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gent to have been taken into account. While, as held in *Boom Co. v. Patterson*, 98 U. S. 403, 408, the general rule is that 'compensation is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future,' it is well settled that mere possible or imaginary uses, or the speculative schemes of its proprietor, are to be excluded,"—citing the authorities. This is undoubtedly the sound view. And MR. JUSTICE HARLAN puts the point with great clearness in the same case at page 258, 166 U. S., and page 593, 17 Sup. Ct., saying: "Compensation was awarded to the railroad company upon the basis of the value of the thing actually appropriated by the public,—the use of the company's right of way for a street crossing,—having regard to the purposes for which the land in question was acquired and held, and was always likely to be held. In the case of individual owners, they were deprived of the entire use and enjoyment of their property, while the railroad company was left in the use and possession of its property, for the purposes for which it was being used, and for which it was best adapted, subject only to the right of the public to have a street across it. In this there was no denial of the equal protection of the laws," etc. The doctrine of *Boom Co. v. Patterson*, 98 U. S. 402, has no application to this case. Patterson owned his island absolutely, to be used or sold for any purpose he pleased. His use of it was not limited, as is the use of its right of way by a railroad. The difference in the nature and character of the uses to which the property in the two cases may be put makes the difference in the elements of damage, proper, respectively, in the two kinds of cases. It was proper to consider the "adaptability" (page 409) "of the lands for the purpose of a farm" in Patterson's Case, because that was, under the law, a use to which, as owner in fee, unrestrictedly, he could put it. So far as the contention that the railroad company might, in the future, conclude to lay other tracks, or side tracks, and

Same—Same.

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LOUISVILLE & N. R. Co.

v.

SAMUELS' EX'RS.

(Court of Appeals of Kentucky, June 1, 1900.)

Fires Set by Locomotives—Spark Arresters—Liability.*—A railroad company is not liable for injuries resulting from sparks escaping from its locomotive, if it was furnished at the time with the best and most approved screen and spark arrester in practical use, and they were in perfect order, and the company was not negligent in the operation of the engine.

Same—Same—Defects—Evidence.—In an action against a railroad company to recover for loss by fire alleged to have resulted from negligence in operation, or from failure to have the spark arrester in proper condition, testimony showing that sparks and cinders were emitted by the locomotive in unusual quantities was competent, and will of itself warrant the presumption that the arrester was out of order, or improperly adjusted, and that defendant was guilty of negligence in this respect.

Same—Structures on Right of Way—Duty to Guard against Fires.—Where one places a building, such as a private depot, or other property, upon the right of way of a railroad company, with or without its consent, in close proximity to the track, for the especial purpose of using the same in connection with, and as a part of, the railroad system, he is bound to exercise a higher degree of care to protect such property from railway fires than if it was not so placed.

Spark Arresters.—A railway company is not bound to adopt any particular kind of appliance for arresting the escape of sparks from its locomotives. All that the law requires is that it shall provide and use the best and most effectual appliance for this purpose in general use.

APPEAL by defendant from Nelson county circuit court.
Reversed.

Jno. S. Kelley, for appellant.

Geo. S. & John A. Fulton and E. E. McKay, for appellees.

*See monographic note on "Fires," 15 Am. & Eng. R. Cas., N. S., 495 *et seq.*

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BURNAM, J. This is an action by appellees to recover of appellant damages for the destruction of a warehouse, partially located on appellant's right of way on the line of its Springfield Branch, and of 41 barrels of whiskey stored therein, alleged to have been occasioned by burning cinders, sparks, and fire being thrown upon the warehouse from one of appellant's locomotives passing at the time; and it is further alleged that the escape of the sparks was due to the negligent construction, operation, and management by appellant and its operatives of the locomotive. The answer of appellant is a denial of the affirmative allegations of the petition, and a plea of contributory negligence on the part of appellees. The trial resulted in a verdict and judgment in favor of appellees.

Case Stated.

The testimony shows that this warehouse was built in 1866; that there was a platform eight feet wide in front of it, which extended nearly to the track of the railroad, and that the roof on the main building projected over the platform; that it was originally built to be used, not only as a warehouse, but also as a depot, by appellant; and that it was so used up to the year 1881, at which time the depot was moved, but the house thereafter continued to be used as a warehouse for storing whisky, salt, lime, cement, and other heavy goods handled by appellee as a merchant; and that these commodities were received and delivered from the building, the cars stopping immediately in front thereof for this purpose. It further appears that the building had become quite dilapidated, and the shingle roof, which was the same one put on the house when originally built, had become, from long exposure to the elements, very frail and combustible; that appellee recognized this fact, and mentioned it to one of appellant's engineers in charge of another train, cautioning him to be careful in passing; and it also appears that he had spoken of having a new roof put on the building. It may be fairly inferred from the proof in the record that the building was ignited by sparks from appellant's engine, but the testimony for appellant conduces very strongly to show that

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the engine was provided at the time with a spark arrester, in conformity with section 782 of the Kentucky Statutes, and that it was run carefully, by tried and competent men.

The testimony of appellee, relied on to establish the alleged negligence either in the construction or operation of the engine, is confined to statements of witnesses who testify as to the escape of sparks and cinders from passing locomotives in considerable quantities. The witness Anderson says that on the day of the fire he saw a great many cinders near his barn, located about one quarter or one-half mile from the house which was burned, and about 50 feet from the right of way, which were thrown out by the engine, and that the ground was covered with them. Everett Roberts testifies that he was walking along the road which ran parallel to the railroad track, about 50 or 60 feet therefrom, a few minutes after the engine had passed, and that he observed there were fresh cinders in considerable quantities on the pike, about three-quarters of a mile from where the warehouse was burned. The witness Varnum testifies that he was standing on the platform at the depot, and that when the train started off there were considerably more sparks and cinders emitted from the engine than when it was running; that as he was going to Samuels' Depot, walking, he saw the grass on fire that had caught from the engine, and that he had noticed it throwing out sparks in considerable quantities. And the witness Vittoe says that his residence is only a few feet from the right of way; that there is a heavy grade near the house that was burned, and when engines would start, and the wind was from the south or southwest, sparks and cinders would fall in considerable quantities on the platform, and would fall on the top of his house, and run down. There is also testimony conducing to show that the engine was an old one, and smaller in size than those usually employed by the defendant.

The law is well settled in this state that a railroad company, authorized by its charter to use steam power, has

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necessarily the right to use fire as a means of generating steam, and is not liable for injuries resulting from sparks escaping from its locomotive, if it was furnished at the time with the best and most approved screen and spark arrester in practical use, when these appliances were in perfect order, if not otherwise guilty of negligence in the operation of its engine. See Railroad Co. v. Dalton (Ky.), 43 S. W. 431; Railroad Co. v. Barrow, 89 Ky. 638, 20 S. W. 165; Railroad Co. v. Taylor, 92 Ky. 55, 17 S. W. 178; and Railroad Co. v. Mitchell (Ky.), 29 S. W. 860. But it is equally well settled that, in an action against a railroad company to recover for loss by fire alleged to have resulted from negligence in operation, or from failure to have the spark arrester in proper condition, testimony showing that sparks and cinders escaped from the locomotive in unusual quantities was competent, and will of itself warrant the presumption that the arrester was out of order, or was improperly adjusted, and that the defendant was consequently guilty of negligence in this regard. See Railroad Co. v. Taylor, 92 Ky. 52, 17 S. W. 198. And in the case of Railroad Co. v. Barrow, 89 Ky. 643, 20 S. W. 165, it was held competent for plaintiff to prove, in the absence of direct evidence as to the condition of the particular locomotive at the time of the fire, that trains frequently set fire to fences and grass along the line of the road in the vicinity of plaintiff, basing this ruling upon the opinion in the case of Sheldon v. Railroad Co., 14 N. Y. 218, in which the court said: "The business of running trains on a railroad supposes a unity of management, and a general similarity in the fashion of the engines and the character of the operation." The question in that case was whether it was competent to show, about the time when the fire occurred, that sparks and burning coals were frequently dropped by other engines passing on the same road, and upon previous occasions, and it was held that such testimony was competent. From the opinions in these cases we think there was, at least, a scintilla of com-

Fires Set by—
Locomotives—
Spark Arresters—
Liability.

Same—Same—
Defects—Evi-
dence.

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petent evidence conducing to show negligence either in the construction or operation of the engine which ignited the warehouse, and that appellant's motion for a peremptory instruction was properly overruled.

It is urged by appellant that, under the peculiar facts of this case, it was entitled to an instruction upon its plea of contributory negligence. The decisions as to the effect of

Same—Structures
on Right of Way
—Duty to Guard
against Fires.

the contributory negligence of a property owner whose property is destroyed by fire negligently set by a railway company on his right to recover are not uniform, but the great weight of authority is to the effect that the owner of premises near or contiguous to a railroad right of way is not bound to anticipate negligence on the part of the railroad, and to make provision against the communication by fire. He has the right to use his property in the usual and ordinary way, and to presume that the railroad company will not be guilty of negligence. See 3 Elliott, R. R. § 1238. And the mere fact that plaintiff built his warehouse on defendant's right of way, with the latter's consent, does not, of itself, constitute negligence; but where one places a building or other property upon the right of way of a railroad company, either with or without its consent, in close proximity to the track, for the especial purpose of using same in connection with, and as a part of, the railroad system, thus exposing it to unusual hazard from railway fires, he is bound to take notice of the unusual and increased risk, and to exercise a higher degree of care than if the property were not so placed. The testimony in this case shows that this building was really used as a private depot for the accommodation of appellee, and was peculiarly exposed to fire on account of its proximity to appellant's trains passing upon its road, and he was bound to use reasonable care, considering its relation to the railroad, to protect his property, to relieve him from liability for contributory negligence, and the jury should have been so instructed.

The jury were told, in the third instruction, that "it was the duty of appellant to provide its locomotive engine with

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a spark arrester most approved by those who, from experience and business, are most competent to judge ^{Spark Arresters.} and determine." This instruction was misleading. A railway company is not bound to adopt any particular kind of appliance for arresting the escape of sparks from its locomotives. All that the law requires is that it shall provide and use the best and most effectual appliance for this purpose in general use. See 3 Elliott, R. R. § 1224, and Railroad Co. v. Dalton (Ky.), 43 S. W. 431.

A number of other errors are complained of, but, as they are not likely to again occur upon a new trial, they will not be discussed. For the errors pointed out, the judgment is reversed, and cause remanded for a new trial consistent with this opinion.

BOGGS *et al.*

v.

MISSOURI, K. & T. RY. CO.

(*Supreme Court of Missouri, May 15, 1900.*)

Fences—Stock Lost but Not Killed—Statute.*—Under section 2611, Mo. Rev. St. 1889, a railroad is liable for double the value of stock lost through its failure to discharge its statutory duty to maintain its right of way fences in a proper condition, although the stock were not killed by reason of such failure, where such failure was the proximate cause of the loss.

APPEAL by defendant from Howard county circuit court.
Affirmed.

Geo. P. B. Jackson, for appellant.

BRACE, P. J. This is an action for double damages, under section 2611, Rev. St. 1889, begun before a justice of the peace in Howard county, taken thence by appeal to the Howard county circuit court, where the plaintiffs had judgment for \$18.40, double the value of two hogs, which

*See notes at end of case.

Notes

escaped from plaintiff's inclosed field onto the defendant's adjoining right of way by reason of defendant's defective fence, and were lost. The case reached this court by appeal in the same manner and for the same reasons as the case of *Kingsbury v. Railway Co.* (just decided), 57 S. W. 547, in the opinion in which all the questions raised in this case are disposed of adversely to defendant's contention, except one. It is contended in this case that section 2611 does not apply to a case where hogs wander off and are lost, but not killed, by reason of the defendant's failure to discharge its statutory duty; and in support of this contention *Gordon v. Railway Co.*, 44 Mo. App. 201, is cited. To entitle a plaintiff to recover under this statute the defendant's failure to discharge its duty must, of course, be the proximate cause of the loss. In that case a recovery was denied the plaintiff for the loss of a steer on the ground that there was no evidence that the loss was the proximate consequence of the default of the railroad company. But in this case it was admitted "that at said time and place the defendant did not have upon the sides of its road fences sufficient to turn hogs," and "that plaintiff's two hogs, of the value of \$9.20, passed out of and escaped from the inclosed and cultivated fields along and adjoining defendant's railroad, and were thereby lost"; thus conceding that the loss was the proximate consequence of the default, and bringing the case within the express terms of the second alternative clause of the damage act, under which it was not necessary to show that the animals were killed by the defendant's "agents, engines, or cars," as under the first. The ruling on this contention must also be against the defendant. The judgment of the circuit court is affirmed. All concur.

NOTES.

Injuries to Stock—Failure to Fence—Actual Contact Necessary.—Whether or not a railroad company is liable for injuries to animals received otherwise than by actual collision with the company's engines and cars, in consequence of their failure to provide proper

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fences as required by statute, depends largely on the wording of the statute.

Illinois.—Under a statute providing for damages done by "agents, engines, or cars," of a railroad company to live stock in case of the want of proper fences does not extend to the injury of a horse by running into a wire fence when frightened by an approaching train. *Schertz v. Indianapolis B. & W. R. Co.*, 107 Ill. 577, 15 Am. & Eng. R. Cas. 523.

Indiana.—A railroad company is not liable for injuries to stock resulting from fright at their cars or locomotives, where the injured animal had not come into actual collision with the cars or engines. *Pennsylvania Co. v. Dunlap*, 112 Ind. 93; *Croy v. Louisville, New Albany & Chicago R. Co.*, 97 Ind. 126, 19 Am. & Eng. R. Cas. 608; *Ohio & Miss. R. Co. v. Cole*, 41 Ind. 331; *Wabash Ry. Co. v. Forhee*, 77 Ind. 162; *Indianapolis, etc., Ry. Co. v. McBrown*, 46 Ind. 231, 6 Am. Ry. Rep. 415; *Balto., P. & C. Ry. Co. v. Thomas*, 60 Ind. 109; *Peru & Indianapolis R. Co. v. Hasket*, 10 Ind. 409, 71 Am. Dec. 335; *Ft. Wayne, C. S. R. Co. v. O'Keefe*, 4 Ind. App. 249, 30 N. E. Rep. 916; *Louisville, E. & St. Louis R. Co. v. Thomas*, 106 Ind. 10, 5 N. E. Rep. 198; *Jeffersonville, M. & Y. R. Co. v. Dunlap*, 112 Ind. 93, 31 Am. & Eng. R. Cas. 512, 13 N. E. Rep. 403; *Louisville, N. A. & C. R. Co. v. Smith*, 38 Ind. 575, 19 Am. Ry. Rep. 18; *Childers v. Louisville, N. A. & C. Ry. Co.*, 41 N. E. Rep. 21.

Mississippi.—When a horse is injured by jumping off the track, when frightened by approaching train, the railway company will not be liable in Mississippi. *New Orleans & N. E. R. Co. v. Thornton*, 65 Miss. 256.

New York.—Under Laws 1854, chap. 282, sec. 8, making a railroad company liable for damages done by its engines or agents to animals on the railroad, through non-maintenance of a proper fence to its road, the death of such animal must be the result of its being struck by the engine and not of its jumping off the track at the engine's approach. *Knight v. New York, L. E. & W. R. Co.*, 99 N. Y. 25; *Hyatt v. New York, L. E. & W. R. Co. (Sup.)*, 19 N. Y. S. 461; *Graham v. President, etc., of Delaware & H. Canal Co.*, 46 Hun 386.

Tennessee.—Liability for damages from "any accident or collision that may occur," in case of failure to take precautions specified by statute when any person, animal or other obstruction appear upon the track of a railway company does not extend to the loss of a mule which ran in front of a train upon a trestle and was killed in jumping off. *Holder v. Chicago, St. Louis & Mo. Ry. Co.*, 11 Lea 176; *Sinard v. Southern R. Co. (Tenn.)*, 14 Am. & Eng. R. Cas., N. S., 17; *Nashville, etc., R. Co. v. Sadler*, 91 Tenn. 508, 30 Am. St. Rep. 896.

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Texas.—Under Rev. St., art. 4245, making railroads liable to the owner for the value of all stock killed or injured by the locomotive and cars of such railroad company in running their respective railroads, there can be no recovery unless the injury is caused by actual collision of the locomotive or cars with stock injured. *International & G. N. R. Co. v. Hughes*, 68 Texas 290, 31 Am. & Eng. R. Cas. 569; *Houston & T. C. R. Co. v. Harris*, 3 Tex. App. (Civ. Cas.) 270; *Texas & P. R. Co. v. Mitchell* (Tex. App.), 17 S. W. 1079.

Same—Same—Actual Contact Not Necessary.—In the following states it has been held that actual contact with the train was not necessary.

Iowa.—The fact that the train did not actually strike the horse, does not relieve the company of liability. *Kraus v. Burlington, C. R. & N. R. Co.*, 7 N. W. Rep. 598, 55 Iowa 388; *Young v. St. Louis, K. C. & N. R. Co.*, 44 Iowa 172; *Liston v. Central Iowa R. Co.*, 26 Am. & Eng. R. Cas. 593, 70 Iowa 714, 29 N. W. Rep. 445; *Moore v. Burlington & Western R. Co.*, 31 Am. & Eng. R. Cas. 572; *Van Slyke v. Chicago, St. Paul & K. C. R. Co.*, 80 Iowa 620.

Kansas.—Under a statute making a railway company liable for animals killed or wounded "by the engines or cars on such railway," unless the road is lawfully fenced, actual collision is not necessary to create the liability, but this may extend to an injury to an animal in falling into an open bridgeway when frightened by a train. *Atchison, T. & S. F. R. Co. v. Edwards*, 20 Kan. 531; *Atchison, T. & S. F. R. Co. v. Jones*, 20 Kan. 527. Under the Gen. St. 1889, par. 1252, a railroad company in Kansas was held liable, when a horse which was feeding along the right of way of a railroad company at a place where its track should have been fenced but was not, became frightened and ran into a barbed wire fence and was injured. *Missouri Pac. Ry. Co. v. Gill*, 30 Pac. Rep. 414.

Minnesota.—By the Minnesota statute it is provided that "the railway company is liable for all damages sustained by any person in consequence of such failure or neglect." *Savage v. Chicago, etc., R. Co.*, 13 Am. & Eng. R. Cas. 566; *Nelson v. Chicago, etc., R. Co.*, 30 Minn. 74.

Missouri.—Under Missouri Revised Statutes of 1889, sec. 2612, it was held that where a cow was frightened by an approaching train, and was injured by running into a wire fence, the railroad company was liable. *Perkins v. St. Louis, I. M. & L. R. Co.*, 15 S. W. 320, 103 Mo. 52, *overruling* all cases to the *contra*.

Nebraska.—Under sections 1, 2, art. 1, chap. 72, Comp. St., a railroad company is liable for injuries caused by a moving train to cattle, horses, sheep, or hogs upon its track at a place where it ought to have been, but was not, fenced, although there was no actual

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collision between the train and the animals injured. Chicago, B. & Q. R. Co. v. Cox, 7 Am. & Eng. R. Cas., N. S., 379. Following Railroad Co. v. Pounder, 54 N. W. 509, 36 Neb. 247. *Overruling* Burlington & M. R. Co. v. Shoemaker, 25 N. W. 365, 18 Neb. 369, 22 Am. & Eng. R. Cas. 565.

Oregon.—In Oregon where a horse was frightened by a moving train and injured, held that the company was liable. Meeker v. Northern Pacific R. Co., 14 L. R. A. 841, 21 Or. 513, 28 Pac. Rep. 639.

COLE

v.

NEW YORK, N. H. & H. R. Co.

(*Supreme Judicial Court of Massachusetts, Nov. 26, 1899.*)

Crossings—Failure to Look—Negligence—Liability.*—Where the failure of plaintiff to look for trains before stepping back from one track onto another, contributes to his injury by a train, there can be no recovery for the injury, even though he was rightfully using the tracks as a foot-path and the accident might have been avoided by the exercise of due care on the part of the engineer, after he saw plaintiff on the tracks.

Res Gestæ—Declarations of Employee.—Testimony to show that the engineer, several hours after the accident, made statements tending to show that he was negligent in not avoiding to injure plaintiff after he saw him in a place of danger, was inadmissible, not being a part of the *res gestæ*.

EXCEPTIONS by plaintiff from Bristol county superior court. *Overruled.*

L. L. B. Holmes and *A. B. Collins*, for plaintiff.

F. S. Hall, for defendant.

LATHROP, J. The plaintiff was injured by being struck

*See *Hunter v. Montana Cent. Ry. Co.* (Mont.), 16 Am. & Eng. R. Cas., N. S., 615; *Steele v. Northern Pac. Ry. Co.* (Wash.), 15 *Id.* 129; *Illinois Cent. R. Co. v. Jones* (C. C. A.), 15 *Id.* 16; *Conklin v. Erie R. Co.* (N. J.), 15 *Id.* 61; *Coppuck v. Philadelphia, etc., R. Co.* (Pa.), 15 *Id.* 68.

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by a locomotive engine of the defendant near Myrick's station, in the town of Berkley. This station is between two lines of railroads operated by the defendant; one being the main line from Taunton to New Bedford, and the other line from Fall River to Middleboro. These roads cross each other about 300 feet north of the station at Myrick's, and there is no access to the station except by crossing two or more of the railroad tracks at grade. The main tracks from Taunton to New Bedford are on the east side of the station, and run north and south. There is a public highway running east and west, which crosses the tracks a few feet southerly of the intersection of the lines above mentioned. There were different ways of going to the station, but there was evidence that most of the travel for many years was over the public street crossing, and then between the two main tracks of the New Bedford & Taunton Railroad, which were about 6 or 8 feet apart, thence crossing the west track to a space about 20 or 30 feet north of the north end of the station platform, and thence to the station. The plaintiff, who had lived in the neighborhood for several years, on the morning of a clear day started for the station, by the way above described, to meet his brother, who was coming by a train soon to arrive. He testified that he stood on the highway until a freight train had passed; that then he stepped across the track, and looked both ways, to see if everything was all clear, and saw nothing in the way; that he then started to go down to the station between the north-bound track and the south-bound track; that, after he got 150 or 200 feet down, he heard a noise, and looked round, and jumped; that he had just stepped over the rails of the south-bound main track when he heard the noise; that he then looked, and jumped back; that he intended to cross over this main track, although he had not got to a point opposite the end of the platform. The plaintiff was struck while on the south-bound track. It does not seem important in this case to determine whether the defendant owed the same duty to the

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plaintiff, who was going to the station to meet his brother, as it would have owed him had he intended to become a passenger, as we are of opinion that it clearly appears that the plaintiff was not in the exercise of due care in attempting to cross the south-bound track without looking to see whether a train was approaching. This has been so often decided, and the reasons for the rule have been so often stated, that it is unnecessary to repeat them. *Tyler v. Railroad*, 157 Mass. 336, 32 N. E. 227, and cases cited; *Sprow v. Railroad*, 163 Mass. 330, 39 N. E. 1024; *Chase v. Railroad Co.*, 167 Mass. 383, 6 Am. & Eng. R. Cas., N. S., 343, 45 N. E. 911; *Ellis v. Railroad*, 169 Mass. 600, 48 N. E. 839; *Emery v. Railroad*, 173 Mass. 136, 53 N. E. 278.

Crossings—Failure to Look—Negligence—Liability.

Two questions of evidence remain to be noticed :

First. The plaintiff offered to show that the defendant did not clear the way west of the station when there was a snowstorm, as bearing upon the question whether the way traveled by the plaintiff was the one held out to the public. This evidence was excluded. As we have assumed that the way traveled was a proper way to reach the station, this evidence becomes immaterial.

Second. The plaintiff offered to show that the engineer of the locomotive engine which struck the plaintiff stated in the afternoon of the day of the accident that he saw the plaintiff walking between the tracks towards the station some time before he sounded the whistle that morning, and that he saw the plaintiff before he was struck. The judge rightly excluded the evidence. In the view we take of the case, this evidence was immaterial, as we decide the case on the ground of the want of due care on the part of the plaintiff, without regard to the question whether the defendant was negligent. In the next place, the evidence was incompetent. The engineer's admissions were not admissible in evidence. *Robinson v. Railroad Co.*, 7 Gray 92; *Lane v. Bryant*, 9 Gray 245; *Williamson*

Res Gestæ—Declarations of Employee.

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v. Railroad Co., 144 Mass. 148, 30 Am. & Eng. R. Cas. 636, 10 N. E. 790; McKinnon v. Norcross, 148 Mass. 533, 20 N. E. 183; Tyler v. Railroad Co., 157 Mass. 336, 339, 32 N. E. 227; Eastman v. Railroad, 165 Mass. 342, 43 N. E. 115. Exceptions overruled.

LONG

v.

CHICAGO, R. I. & T. Ry. Co.

(Supreme Court of Texas, June 25, 1900.)

Fellow Servants—"Same Character of Work"—Statute.—The work immediately at hand when plaintiff was injured was the carrying of tools to the tool house. For the accomplishment of this purpose, some of the employees (including those through whose negligence the injury was inflicted) were using a hand car, while others, including plaintiff, were merely carrying them in by hand. *Held*, that the former and the latter were not engaged in the "same character of work," within the meaning of the statute of Texas providing that railroad employees engaged in the "same character of work" shall, under certain circumstances, be considered fellow servants.

Same—"Same Piece of Work."—Nor were plaintiff and the employees operating the hand car for such purpose engaged upon the "same piece of work" within the meaning of the statute.

Appeal—Review.—Plaintiff assigned in the court of civil appeals that the trial court erred as to the amount of damages. The court of appeals concurred with the trial court in holding that plaintiff was not entitled to recover, but expressly declined to pass upon the question as to the amount of damages. *Held*, on appeal from the court of civil appeals, that the finding of the trial court as to the amount of damages would not be accepted as an established fact.

ERROR by plaintiff to Second judicial district court of civil appeals. *Reversed*.

Barrett & Barrett and *W. S. Jamison*, for plaintiff in error.

Graham & Ayres, for defendant in error.

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GAINES, C. J. This is an action brought by plaintiff in error to recover of the defendant in error damages for personal injuries alleged to have been inflicted upon him by the servants of the company. The case was tried before the court without a jury, and the judge filed his conclusions of fact and law, and gave judgment for the defendant.

Case Stated.

The conclusions are as follows: "First. That on June 28, 1898, plaintiff was in the service of defendant as a section hand. The section of the road upon which plaintiff worked crossed the track of the M., K. & T. Ry., there being a bridge on defendant's road, about 190 feet long, at the place where it crossed the track of the M., K. & T. Ry., and this bridge, at the point where it passed over the M., K. & T. Ry. track, was about 25 feet above the M., K. & T. Ry. track; that is, from the rail on defendant's track to the ground was about 25 feet. About 20 other section men were at work with plaintiff on said section on that day. It was the custom of all the section men and their foreman who worked on said section to meet at the tool house, which is about 246 yards north of said bridge, at the beginning of each day's work, to procure the tools with which they worked. It was also their custom to return to said tool house, and place their tools therein, at the close of each day's work. The work of each day began and closed at the tool house. On the day above mentioned, at the hour to quit work and return their tools to the tool house, plaintiff and others of the section men started north towards the tool house, carrying the tools with which they had worked. Before reaching the bridge, they met a hand car used on said section going south to get some tools to carry back to the tool house. This car was being operated by some of the section men whom the foreman had directed to go after the things. This hand car, upon returning, on its way to the tool house, overtook plaintiff and two other of the section men while they were on the bridge, walking towards the tool house, carrying their tools. It was running at a speed of about eight miles an hour. The other two managed to step onto the ends of the

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cross-ties outside the rails before the car struck them, but plaintiff failed to do this, and was run over by said hand car at the point on defendant's track just above the track of the M., K. & T. Ry., and was run over by said hand car and injured. I find that the men operating the hand car were negligent in running upon plaintiff, and that plaintiff did not contribute to his injury by any negligence upon his part; and I find that plaintiff sustained damage to the amount of one thousand dollars. Yet I render judgment for defendant, because I conclude that the plaintiff and the section men operating said hand car were fellow servants, and I further find that plaintiff was not engaged in operating the trains, cars, or locomotives of defendant. The above finding as to the amount of plaintiff's damage is not made at the request of plaintiff, but is made over his objection." The case having been appealed to the court of civil appeals, the conclusions of fact and law were adopted by that court, and the judgment was affirmed.

The trial court's conclusion that the servants upon the hand car, whose negligence caused the injury, were the fellow servants of the plaintiff, was assigned as error in the court of civil appeals, and is assigned in this court. That, according to the rulings of this court, these employees would have been fellow servants at common law, there can be no question. But the common law in regard to fellow servants has been changed by statute in this state. The legislature has passed three acts upon the subject, each of which has had the effect of placing restrictions upon the rule. The first was approved March 10, 1891, and, in so far as it bears upon the question before us, it reads as follows: "Sec. 2. That all persons who are engaged in the common service of such railway corporations and who, while so engaged are working together at the same time and placed to a common purpose, of same grade, neither of such persons being entrusted by such corporations with any superintendence or control over their fellow employees, are fellow-servants with each other: provided, that nothing herein contained shall be so

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construed as to make employees of such corporation, in the service of such corporation, fellow-servants with other employees of such corporation, engaged in any other department or service of such corporation. Employees who do not come within the provisions of this section shall not be considered fellow-servants." The second section of the act approved May 4, 1893, seems merely to have extended the benefits of the section just quoted to the employees of the receivers, managers, or persons in control of railways. The act of June 18, 1897, makes more sweeping changes. The first section excludes all persons "engaged in the work of operating the cars, locomotives or trains" of a railroad company from the rule of fellow servants. Section 3 is a substitute for section 2 of the previous act, and is as follows: "All persons who are engaged in the common service of such person, receiver, or corporation, controlling or operating a railroad or street railway, and who while so employed, are in the same grade of employment and are doing the same character of work or service and are working together at the same time and place and at the same piece of work and to a common purpose, are fellow-servants with each other. Employees who do not come within the provisions of this section shall not be considered fellow-servants." The additional limitations placed upon the rule by the language just quoted are two: First, the employees must be doing the same character of work; and, second, they must be working at the same piece of work. In determining this case we may concede, for the sake of the argument, that the men who were engaged in carrying in the tools at the time the accident occurred were working together at the same time and place, and to a common purpose. They were clearly of the same grade of employment. The questions, then, to be determined, are: Were the men who were operating the hand car and the plaintiff engaged in the same character of work? and were they engaged in the same piece of work, within the meaning of the statute? Neither the meaning of the terms "character of work" nor that of the words "same piece of work" is at

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all clear. In a very broad general sense, all ordinary laborers doing work which requires no especial skill may be said to be engaged in work of the same character. On the other hand, employing the word in a very restricted sense, the man who holds the spike may be said to be engaged in a different character of work from that of the servant who drives it. It would seem that the former meaning is too general while the latter is probably too restricted. So, too, with the terms, "piece of work." In a general sense, changing the rails upon the same part of a railroad track is the same "piece of work." In a limited sense, the handling of the rails and the driving of a spike is a different piece of work. When applied to the complicated constructions and repairs incident to the business of railroads, terms more indefinite could hardly have been found. We must, therefore, forbear the attempt to lay down any general rule to be followed in their construction and application, and content ourselves with the endeavor to apply them to the particular facts of this case. The work immediately at hand when the injury was inflicted was the carrying of the tools to a place of safety. For the accom-

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plishment of this purpose, some of the employees (including those through whose negligence the injury was inflicted) were using a hand car, while others, including the plaintiff, were merely carrying them in by hand. The means employed by the former was so distinctly different from those in use by the latter that we are of opinion that they were engaged in a different character of work within the meaning of the statute. Nor do we think that it can be said that at the very time of

Same—"Same Piece of Work."

the accident the plaintiff and those operating the hand car were doing the same piece of work.

If the injury had been inflicted by one of the employees working the hand car upon another who was then engaged in operating the same car, it should be held that they were engaged upon the same piece of work. But it would seem that each employee who was carrying one or more tools without the aid of another was engaged in a dif-

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ferent piece of work from that which was being done by any one of his co-employees. Our conclusion is that the court erred in holding that the servants upon the hand car were fellow servants with the plaintiff, and therefore the judgment must be reversed.

When the facts have been found by the trial judge, it is the ordinary rule, in case the judgment be reversed, to render judgment upon the facts. But in this case the plaintiff in error assigned in the court of civil appeals that the trial court erred as to the amount of <sup>Appeal-
Review.</sup> damages. The court of civil appeals having concurred with the trial court in holding that the plaintiff was not entitled to recover, expressly declined to pass upon the question as to the amount of the damages. We are of opinion that we ought not to accept the finding of the trial judge as an established fact, and to render judgment accordingly, in the absence of at least an implied approval of that finding by the appellate court. For this reason we think the case ought to be remanded for a new trial. Accordingly, the judgment of the district court and that of the court of civil appeals are reversed, and the cause remanded.

EATON

v.

NEW YORK CENT. & H. R. R. Co.

(Court of Appeals of New York, June 12, 1900.)

Inspection of Foreign Cars.*—It is the duty of a railroad to furnish its employees with safe and suitable appliances, so far as reasonable care will accomplish that result, and under this rule a railroad is bound to inspect cars received from other companies; and if such

*See *Louisville & N. R. Co. v. Veach* (Ky.), 11 Am. & Eng. R. Cas., N. S., 24 and *foot-note*; *Union Stock-Yards Co. v. Goodwin* (Neb.), 12 *Id.* 502; *St. Louis, etc., Ry. Co. v. Brown* (Ark.), 16 *Id.* 440.

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cars have defects visible or discernible by ordinary examination, it must either remedy such defects or refuse to take them.

Fellow Servants—Car Inspector and Brakeman.*—Although a brakeman has assented to a rule requiring the brakemen or trainmen to inspect the brakes, etc., at all stoppings of trains, he is not a fellow servant of a car inspector, so as to relieve the railroad company for injuries to such brakeman occasioned by the negligence of an inspector in failing to discover a defect in a brake; as such a rule requires a brakeman to make only such examinations of appliances, which his employment compels him to use, as the ordinary knowledge of brakeman, and the time allowed for the purpose consistent with his other duties, will enable him to make.

Same—Effect of Rule Requiring Brakeman to Inspect Appliances.—Under such a rule, although it requires brakemen to inspect brakes at all stoppings of trains, the negligence of a fellow brakeman in inspecting or failing to inspect a brake cannot be imputed to another brakeman injured while using such brake by reason of a defect therein.

APPEAL by plaintiff from Fourth department appellate division supreme court. *Reversed.*

William S. Jenney, for appellants.

Edward Harris, for respondents.

CULLEN, J. This action was brought, servant against master, to recover damages for personal injuries. The plaintiff was an experienced brakeman in the defendant's employ, and at the time of the accident was in service on a freight train. While applying the brake, the attachment of the brake chain to the foot of the brake staff gave way, and the plaintiff was precipitated from the top of the car upon the track, where his legs were run over by the rear car of the train. The car on which the plaintiff attempted to set the brake was that of another company, which had been received for transportation at Buffalo. On an examination after the accident it appeared that the eye-bolt, by which the chain had been attached to the foot of the brake staff, was broken. Evidence was given to the effect

*See *Felton v. Bullard* (C. C. A.), 14 Am. & Eng. R. Cas., N. S., 547 and *note*, p. 558.

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that the shank or pin of the eyebolt had been worn to such an extent that it was only half its original thickness; that this rendered the bolt liable to break, not only on account of the loss of metal, but because of the play which was given the pin in the hole in the brake shaft in which it was set. There was also evidence given from which the jury might have found that a reasonable inspection of the pin and brake shaft at this point would have disclosed the weakness of the parts. The car was inspected at Buffalo by the defendant's inspectors, but the condition of the eyebolt was not noticed. The jury rendered a verdict for the plaintiff, upon which, a motion for a new trial having been denied, a judgment was subsequently entered. On appeal the judgment and order were reversed by the appellate division, but, as stated in the order of that court, "upon questions of law only, the court having examined the facts and found no error therein."

The learned appellate division, in its discussion of the case, assumed that the question whether the defect in the eyebolt was discoverable or not by reasonable inspection was one of fact for the jury. This assumption, in our opinion, was warranted by the evidence, the details of which it would not be profitable to recite. That it is the duty of the master to furnish his servants with safe and suitable appliances, so far as reasonable care will accom-
Inspection of
Foreign Cars.

plish that result, may be now considered as an elementary rule of law, and this duty applies to cars received from other companies as well as to its own. "A railroad company is bound to inspect the cars of another company used upon its road, just as it would inspect its own cars. It owes this duty as master, and is responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. When cars come to it from another road which have defects visible or discernible by ordinary examination, it must either remedy such defects or refuse to take them." *Goodrich v. Railroad Co.*, 116 N. Y. 398, 22 N. E. 397. See *Gottlieb v. Railroad Co.*, 100 N. Y. 462, 24 Am. & Eng. R. Cas. 421, 3 N. E. 344, 5 L. R. A. 750; Rail-

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road Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624. This doctrine was accepted by the learned court below but it held that the defendant was exempted from liability because of the following rule prescribing the duty of its employees, to which plaintiff was deemed to have assented: "Rule 153. At all stoppings of trains the brakemen or trainmen must inspect the wheels, brakes, and trucks of the car, and report any defects immediately to the conductor." The court reasoned that under this rule the duty of an inspection was devolved upon the trainmen equally with the car inspectors at Buffalo; that the inspectors were fellow servants of the trainmen in the duty of inspection; that the negligence of the former in the discharge of their duty was negligence of fellow servants; and that, if it was negligence on the part of the inspectors not to have discovered the defective character of the brake, similar omission on the part of the plaintiff or the trainmen constituted contributory negligence on the plaintiff's part. There can be no question that, apart from the rule quoted, inspectors are not fellow servants of the trainmen, so as to relieve a railroad company from liability to the latter for injuries occasioned by the negligence of the former. The duty which the master, as such, owes to his employees, of exercising reasonable care that the appliances furnished them should be safe and suitable, cannot be delegated so as to relieve the master from responsibility: and, so far as it is performed by others, the negligence of any servant, agent, or employee in the work is deemed not the negligence of a fellow servant, but that of the master himself. Fuller v. Jewett, 80 N. Y. 46; Bailey v. Railroad Co., 139 N. Y. 302, 34 N. E. 918. In the last case it is said: "The master is never exonerated by the negligent omission of subordinates to perform duties which are imposed upon him in his character as master, resulting in injury to other employees." Inspection to discover whether an appliance is defective is as much a part of the work of furnishing safe appliances as reparation after

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the defect is discovered, and in the Bailey Case the negligence alleged was failure to inspect.

We may concede that the question whether a faulty act or omission complained of is negligence in the discharge of the duty of the master, as such, or is in a detail of the work, may depend on the manner in which the work is carried on. We may also assume, for the argument, that it was within the power of the defendant to have so conducted its business as to have made its trainmen both brakemen and car inspectors. But the question remains whether it did so in this case, and whether such is the effect and object of the rule promulgated. The question is not without interest to the defendant in other cases than that before us. If the same servant is to discharge the duties of separate positions, he must have the necessary qualification for each, to be a competent fellow servant. If a brakeman is to act as car inspector, he must have the expert skill and knowledge which a jury might find was necessary to discharge the duties of the latter position, and the defendant might find itself very much circumscribed in its appointment of trainmen. We think it quite plain that the defendant never intended to blend, nor has blended, the two distinct positions of brakeman and inspector. It appears that, as a matter of fact, it has assumed to inspect cars at its terminus by servants especially designated for that purpose. The rule promulgated by the company must have a reasonable construction. It imposed on the trainmen the obligation of examination of the appliances which their services compelled them to use, both for their own protection and the protection of the property of the master and the persons of their fellow servants. The examination, however, was not necessarily to be that of an expert inspector, but such as the ordinary knowledge of brakemen, and the time allowed for the purpose consistent with their other duties, would enable them to make. We concur in what is said by JUSTICE HATCH in *Myers v. Railroad Co.*, 44 App. Div. 11, 60 N. Y. Supp. 422: "It is quite evident that the measure of obligation which is imposed upon an employee of this

* *Eaton v. New York, etc., R. Co*

character by virtue of this rule is much less strict than is imposed upon employees of the defendant charged with the specific duty of inspecting cars for the express purpose of discovering their condition, and the reason for such distinction is obvious. A brakeman has other duties and obligations resting upon him than that of inspection, and in many cases such duties almost wholly exclude any opportunity to examine the various appliances which he is required to use. Under such circumstances the rule, interpreted in the strict sense, would impose an obligation which the employee would have little or no opportunity to discharge. It must, therefore, be subject to a reasonable interpretation, measured in degree by the opportunity to examine and the character of the existing defect." Under this view, by reason of the difference between the duty of inspection, resting on the trainmen, and that imposed on the car inspectors, the two classes are not fellow servants within the rule which exempts the master from liability. The question of the effect of similar rules arose in *Pratt v Railway Co.*, 63 Hun 616, 18 N. Y. Supp. 682, affirmed without opinion in 136 N. Y. 654, 32 N. E. 1016; and *O'Malley v. Railroad Co.*, 67 Hun 130, 22 N. Y. Supp. 48, affirmed without opinion in 142 N. Y. 665, 37 N. E. 570,—in both of which cases recoveries for defective appliances were upheld. These decisions seem conclusive on the question before us, though we have treated it as an original one.

From the views already expressed it is apparent that a failure to discover defects which would constitute negligence in a car inspector might not necessarily establish contributory negligence on the plaintiff's part. The question was for the jury. There is this further to be said: Under the rule, the duty of inspecting the brakes on the train did not rest on the plaintiff alone, but on him and the other trainmen. The evidence tends to show that in the necessary division of duties between the several trainmen the inspection of the brake that proved defective did not fall upon the plaintiff.

Same—Effect of
Rule Requiring
Brakemen to
Inspect Appli-
ances.

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Assuming that there was negligence on the part of his fellow brakemen, such negligence would not be imputable to the plaintiff, or preclude a recovery by him. *Cone v. Railroad Co.*, 81 N. Y. 206; *Coppins v. Railroad Co.*, 122 N. Y. 557, 25 N. E. 915. The judgment of the appellate division should be reversed, and the judgment entered on the verdict of the jury at trial term should be affirmed, with costs.

BARTLETT, MARTIN, VANN, and WERNER, JJ., concur.
PARKER, C. J., not voting. GRAY, J., not sitting.

Judgment reversed, etc.

CONTINENTAL TRUST CO. OF CITY OF NEW YORK

v.

TOLEDO, ST. L. & K. C. R. Co. *et al.*

In re RHODE ISLAND LOCOMOTIVE WORKS.

(*Circuit Court, N. D. Ohio, W. D., April 20, 1899.*)

Receiverships—Priority—Claims for Equipments.*—A claim for necessary equipments, furnished a railroad a few months prior to the appointment of its receiver, is not entitled to priority of payment out of the corpus and earnings of its property over a vested mortgage lien, where they were furnished on the faith of the credit of an equipment company and a person largely interested in the stock of the railroad, although the railroad gave its notes in payment.

E. C. Henderson, for Continental Trust Co.

Potter & Emery, for Rhode Island Locomotive Works.

Taft, Circuit Judge. The question is on the exceptions to the report of the master as to the priority over the mortgage bonds of the claim made by the Rhode Island Locomotive Works upon notes given by the railroad company for the last 20 per cent. of the purchase price of certain locomotives furnished to the railroad company, part of them eight months before the receivership, and part of them four months

*See note at end of case.

Note

before the receivership. The railroad company was in great need of addition to its locomotive equipment. It applied to the Rhode Island Locomotive Works to furnish them. It had no money with which to pay for them. It was agreed that the Railroad Equipment Company, a third corporation, should take title to the locomotives; should pay to the Rhode Island Locomotive Works 80 per cent. of the purchase price; should enter into a contract of lease and conditional sale with the railroad company, by which, after the company should have paid the 80 per cent. of the purchase price, with interest, the title of the locomotives should be free and unincumbered in the railroad company. The locomotive works received pay for the additional 20 per cent. in notes of the railroad company indorsed by S. H. Kneeland, who was largely interested in the stock of the railroad company. It is contended by the Rhode Island Locomotive Works that it has an equity prior in right to that of the mortgagee, to be paid out of the earnings and corpus of the property, because it furnished this equipment at a time when it was needed to keep the company up as a going concern. The master, after a full hearing and a very satisfactory discussion of the authorities, has reached the conclusion that the locomotive works contracted this loan of 20 per cent. on the faith of the credit of the company and S. H. Kneeland, and that the claim does not come within the class of claims which the supreme court has held may be given priority to a vested mortgage lien. I fully concur in this conclusion, and think it well sustained by the authority of *Penn v. Calhoun*, 121 U. S. 251, 7 Sup. Ct. 906, and *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824.

The exceptions to the master's report are overruled, and the report confirmed.

NOTE.

Mortgages—Priority of Note for Supplies Secured by Collateral.—The circumstance that a company furnishing rails to a railroad company demanded and received collateral security to a large amount

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from the railroad company during the negotiations resulting in the execution of renewal notes under the last contract for rails tended to show that the former did not regard itself as entitled to an equitable claim upon the net earnings of the railroad company in preference to mortgage creditors, but relied upon the general credit of the railroad company. *Lackawanna I. & C. Co. v. Farmers' L. & T. Co.* (U. S.), 20 Sup. Ct. 363.

STATE *ex rel.* CUMBERLAND TELEPHONE & TELEGRAPH CO.

v.

TEXAS & P. RY. CO.

(*Supreme Court of Louisiana, Feb. 19, 1900.*)

Removal of Cause to Federal Court.—If the suit could not originally have been brought in the United States circuit court for want of jurisdiction, *a fortiori* it could not be transferred to that court from the district court.

Carriers of Freight—Discrimination—Mandamus.*—Where a complainant seeks to force a railroad company to afford it facilities equal to those given to a favored rival, the court may issue a *mandamus* to compel it to serve both alike.

Same—Same—Same—Constitutional Law.—A decree, made peremptory, which requires a common carrier to serve conflicting interests without preference, does not have the effect of denying the equal protection of the laws to the defendant railway company.

Same—Tender of Facilities.—Where it appears that more of a tender than made of cars for transportation would have been a mere waste of time and money, a useless expenditure of either is not required.

Same—Mandamus.—While it is true that the court has no legal right to manage the railroad, or direct the details of its operation, or make contracts for the railroad company, it may issue a writ of *mandamus* to compel it to perform a duty clearly defined under the law.

(Syllabus by the Court.)

APPEAL by defendant from parish of Orleans civil district court. *Affirmed.*

*See *Cumberland Tel. & Tel. Co. v. Morgan's L. & T. R. Co.* (La.), 13 Am. & Eng. R. Cas., N. S., 71 and *note*, p. 84.

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Howe, Spencer & Cocke and Clegg & Quintero, for appellant.

Dart & Kernan, for appellee.

BREAUX, J. Plaintiff seeks by *mandamus* to compel the defendant railroad company to haul special cars and run special trains, in order to distribute poles, wires, and cross arms between stations, enabling it thereby to hasten the construction of a telephone line between the city of New Orleans and Shreveport. Relator avers that it owns its own right of way along the line of defendant's road; that it requested it to receive its freight and transport it to points where it is needed; that the latter refuses to transport these poles and other freight, owing to an unlawful combination and conspiracy with the Western Union Telegraph Company, entered into contrary to public policy and in violation of the organic law of the state. It further avers that defendant, as a public carrier, is bound by its charter to treat all alike. The defendant, on the other hand, controverts plaintiff's right to the writ of *mandamus* on a number of grounds, filed in its answer to the proceedings. They are clearly set forth in respondent's assignment of errors, which, after having made a summary of the evidence, we will note.

As relates to the testimony, it appears that relator, by letters and through one of its clerks, requested the defendant to receive its freight. To this request no answer was given, except that filed in this suit, to which we have before referred. Relator, in the answer, says that it could perform the services required of it by relator without great loss or inconvenience either to it or the traveling public, or to those for whom it carries freight; that this loss and inconvenience can be avoided by distributing between trains (that is, between the times of trains, and avoiding passing trains by switching its construction train to a side track); that this can be managed with safety, and the construction train kept out of the way of regular trains, by giving notice usually given to such trains by dispatchers; that there are switches and sidings between

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the regular stations on which trains stop to get out of the way of other trains ; that the material can safely and without inconvenience be delivered between stations by running the construction train at a moderate rate of speed and stopping at every 150 feet, at which distance it is needed by relator for the construction of its line; that this manner of doing this work is not extraordinary at all, and while it is being done the train can be controlled and the work done with perfect safety; that by the exercise of sound judgment the poles and other materials are thrown out at every 150 feet on the line without the least danger; that the delivery would not be entirely unusual on defendant's road, as it delivers freight where there is no station. There is testimony showing that, on a number of roads, materials, such as poles, cross arms, and insulators, were delivered in the same manner as it is proposed by relator to deliver and distribute its materials along the line. This distribution was done on a special distribution train, which was not unwieldy, and was not in the way of other trains. The testimony sets forth that relator would be greatly benefited by the service for which it sues, for the reason that the country through which its line runs is partly swamp, covered with water three or four feet deep in some places, and there is also much underbrush and trees, through which it is impossible for a human being to carry freight. It appears that defendant delivered some of relator's materials at stations. The disagreement relates to the pole places between stations. The witnesses for relator (and there are a number of them) all agree in the statement that the work in question can be performed by the respondent without inconvenience or loss. Defendant examined only one witness,—its freight agent. He denies that an actual and physical tender was made by relator, for transportation, of freight for distribution between stations. He says that he apprehended danger if materials were thrown off from trains moving at a rate of more than 2 or 2½ miles an hour. His theory was if, in throwing off poles, say 30 or 40 feet long,

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weighing 600 or 800 pounds, there happened to be some mistake made, it might fall under the train, instead of on the side, and derail it, or go through the car. He mentioned other possible dangers in this work, and said that there was an element of danger, because, being an irregular train on the line, it might result in a collision between itself and a regular train.

The judge of the district court made the writ of *mandamus* peremptory, and ordered respondent to receive from and transfer and deliver for relator the poles, cross arms, and other materials offered for shipment by relator for the purpose of building its telephone line along the line and route of defendant's railroad from the places mentioned in the judgment, and particularly in the swamp and other inaccessible places between the points mentioned. The power was recognized in the defendant company of regulating the time, order, and manner of delivery, so as not to interfere with their regular business and passenger traffic, and to charge just and proper payment for the service. From the judgment the respondent appeals, and assigns a number of errors in the judgment, which we will pass upon in the order in which they are stated in respondent's brief.

The first error assigned assails the judgment as erroneous on grounds included in the different assignments of error following the first ground of assignment of error. The second assignment sets forth that the court erred in proceeding with the trial of the cause, against appellant's exception, after the cause had been properly removed to the United States circuit court for the Eastern district of Louisiana, and improperly remanded by the United States courts to the state courts. Defendant especially claimed its federal rights under the constitution of the United States. The circuit court of the United States remanded the case to the state courts for the reason that the defendant corporation is a Louisiana one, operating in Louisiana. This fact is not denied by defendant. The ground of objection is that it was erroneously remanded

Removal of
Cause to Fed-
eral Court.

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because the action is removable under the judiciary act of 1887. We have read the act, bearing in mind defendant's contention, and have not found that its cause comes within that act. It was within the cognizance of the district court. We understand that this corporation has been created by the laws of the state in addition to the corporate powers it claims under United States law. The removal was not sustained by any law to which the defendant referred, and, now that it is before us on appeal, we have not been informed under which of the different sections of the law invoked defendant claimed the right to remand. We have not found any provision to sustain its removal. As relates to the federal rights, they are not before us for consideration at this time. They come up in different proceedings.

In the next place, we are informed by the appellant that the Texas & Pacific Railway Company is established by congress to connect the Atlantic and Pacific Oceans by a military and post road, and that no law of any state shall be sanctioned which impedes it, and that the ruling and judgment of the district court unlawfully contravenes this federal right. It does not appear from the evidence that appellant's road, as a military or post road, will be impeded or interfered with in any manner by the proposed service. All the witnesses, except one, sustain the averment that not only the appellant will not in any manner be impeded as a post road, but that its business will not in any manner at all be interfered with, and that under proper management (and none other is contemplated, as we take it) appellant's business will not in any manner be affected. Even the appellant's witness, to whom we have just referred, in answer to the following question: "If I were to call upon you as a man in authority, and say to you, 'I want to hire through you, from your railroad company, one or more flat cars, to be taken out by your engineer, and under your supervision, and entirely suiting your convenience, in order to dump poles,' how could that interfere with your traffic arrangements, and how could you deny me

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that right? You cannot answer that question,"—answered, "No." At this point, appellant's counsel, claiming all of its federal rights as conferred and acquired by congress in different acts, contend with great earnestness and clearness that a writ of *mandamus* to compel a railroad company to do a particular act in constructing its roadbed and buildings, or in running its trains, can be issued only when there is a specific duty on its part to do the act, and a clear proof of the breach of that duty; citing Northern Pac. R. Co. v. Washington Territory, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. Ed. 1092. The issue in the cited case was whether the court could compel the respondent by a writ of *mandamus* to erect and maintain a station house at a point named, and the language of the court should be read with reference to that issue, presenting an entirely different state of facts from that before us for decision in the present case. The court held in the cited case that the railroad company could not be compelled to erect and maintain stations, and the court, pursuing the question further in that connection, said that there was no specific legal duty on its part to do that act, and therefore *mandamus* did not lie. Here (different from the cited case) we take it that the purpose is to maintain similar service as that rendered to the Western Union Telegraph company, a corporation entirely independent of the appellant, and using the telegraph line along the route of the Texas & Pacific Railroad Company, as made evident by the return of property made for taxation by the respondent. The evidence shows that telegraph poles and other materials were delivered from slowly-moving trains on defendant's road. As the defendant owns no telegraph line along its track in Louisiana, it follows that they must have delivered the materials to the Western Union for the repair and improvement of its line. The evidence shows that other companies (and this company, too, we may say) have carried freight to points other than stations. The rule applying has made it the specific duty of carriers to serve all alike. Favors and preferences are to be avoided. A common carrier cannot carry for one and refuse

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to carry for another. A railway is without right to grant privileges where the public is concerned. "If the company possessed this right, it might build up one set of men and destroy others, advance one kind of business and break down another, and make even religion or politics the test in the distribution of its favors" (quoted from *Sandford v. Railroad Co.*, 24 Pa. St. 382, in *Chicago & N. W. R. Co. v. People*, 8 Am. Rep. 690, in which that court maintained a writ of *mandamus* compelling the company to perform the service requested). "The business of the common carrier is for the public, and it is his duty to serve the public indifferently. He is entitled to a reasonable compensation; but, on payment of this, he is bound to carry for whomsoever will employ him to the extent of his ability." *Messenger v. Railroad Co.*, 18 Am. Rep. 756. The services to be rendered by a common carrier exclude the right to give special preference. *Id.*, 37 N. J. Law, 531, citing *New England Exp. Co. v. Maine Cent. R. Co.*, 57 Me. 196.

This brings us to the objection urged by the defendant in support of the assignment of error arising from the asserted attempt to take away a valuable right of property vested in appellant without due process of law. It being the duty of the appellant not to discriminate in its service to the public, and to serve all impartially, a decree requiring service without discrimination is not the taking away of a valuable right of property, but is the enforcement of a duty. Under the laws as we take them, the appellant is expected to give good reasons for not serving one who offers to pay any reasonable amount required for the service. We have not found good reasons for its refusing to serve relator. It is not proposed to interfere in any manner with the traffic or other business of the company. From this point of view there is no interference with the right of property. It is not an arbitrary exercise of the powers of government. It is due process of law.

Same—Same—
Same—Constitutional Law.

The other assignments of error, in the order in which they were argued, the fifth and sixth, are considered and passed

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upon together. Appellant sets forth in these assignments that it is elementary that no action for damages can be maintained against a common carrier, nor can *mandamus* lie, unless the carrier has been put in default in some one of the methods known to the law. We do not disagree with counsel's view of the law on this point; but it must be conceded that one may waive the tender, either expressly or tacitly, and also that one cannot be expected to do vain things. In addition to the proof of repeated requests made by relator for the transportation of its material, the traffic manager testified that the appellant would have refused to hire engine and cars to the relator for the purpose of transporting telegraph poles and materials. It would only have been a waste of time and a useless expenditure of money to have made a physical tender of cars and material therein. Under the circumstances, the steps taken by the relator were equivalent to a physical tender of cars by relator for the transportation of its poles, which we understand is usual in such cases.

Same—Tender of
Facilities.

We pass to the seventh, eighth, and ninth assignments, also considered together: Appellant contends, in support of its position, that there was no law authorizing the lower court to render a judgment making the *mandamus* peremptory, that it never held itself out as a common carrier to distribute freight between stations, and that, even if it has now and then chosen to deliver freight at a platform, a flag station, or a road crossing, that does not authorize any one else to compel the railroad to repeat such an act. As thus stated, it may be that *mandamus* would not lie; but here we think the case presents different conditions. Relator seeks to compel the performance of the same service as that performed for a rival company, in order that it may compete in its line. As between these two companies, the evidence shows that discrimination would be the result. One company would be given the opportunity to live and prosper, while the other, as relates to this line, must go out of existence. This, we think, may be

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prevented by way of *mandamus*. Appellant states further in the brief that the fact that it wishes to distribute poles and cross arms, etc., between stations, to the end that a telegraph line on its right of way may be constructed and repaired, does not impose any legal obligation on it to distribute freight for other people; that it simply amounts to a necessary repair or construction of one of the necessary appliances of a railroad, and does not differ from the distribution of its ties and rails. Here, again, we are not inclined to differ greatly from counsel. Our conclusion would be different if appellant had only provided facilities to repair or reconstruct its own line; but we have seen that the line is not owned by the appellant, and the service of the Western Union is separate and distinct from that which the appellant renders to the public. We have carefully examined each of the references cited by appellant, but we have not found that they sustain any position which must result in discrimination between conflicting interests.

Our attention is called by counsel to the fact that a rigid distinction has always been made in the constitution of Louisiana between executive power on the one hand and judicial power on the other; that during current years, in one way or another, large administrative powers have grown up in the United States, the creation of which has been suggested by the experience of France, Germany, and England. Railroad commissioners have been vested with the authority to inquire into matters such as these here involved. We think it answer enough to state that there is a controversy between relator and respondent involving a right valued at more than \$2,000, and that the organic law vests this court with jurisdiction to decide such controversies. The right claimed and the questions involved are within the court's jurisdiction. We would not be justified in declining to exercise our jurisdiction, in a matter which no court has ever declined to consider, on the ground urged by appellant, when the facts are as they are here.

Appellant with great confidence avers that a federal ques-

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tion is involved. We have not given the question of federal jurisdiction very much thought, and express no opinion upon it. If there is a federal question involved, the supreme court of the United States will give the matter consideration, and rectify the error, if error there be, in our view of the law.

This is the second decision rendered on this line in recent times. We have found no reason to change our views from those expressed in the first. *Cumberland Telephone & Telegraph Co. v. Morgan's L. & T. R. Co.*, 51 La. Ann. 29, 13 Am. & Eng. R. Cas., N. S., 71, 24 South. 803. It is therefore adjudged, ordered, and decreed that the judgment appealed from be, and the same is hereby, affirmed.

BLANCHARD, J., rests his concurrence upon the ground that, defendant company having performed and continuing to perform the same service herein demanded for the Western Union Telegraph Company, it cannot be permitted to discriminate, and owes the duty of performance to relator, and this duty, being of a nature public, may be enforced by *mandamus*.

On Application for Rehearing.

(June 26, 1900.)

BLANCHARD, J. Defendant company is, quoad its lines in Louisiana, a Louisiana corporation. It acquired by purchase and absorption the franchise rights and lines of the New Orleans Pacific Railway Company, which held under a legislative charter from the state of Louisiana, and whose domicile was the city of New Orleans. See Act No. 14, Acts La. 1876, and articles of agreement of consolidation between the Texas Pacific Railway Company and the New Orleans Pacific Railway Company, found in the record. It is not true that the court, in its decree heretofore rendered, has assumed the authority to manage defendant company's railway and to direct the running of its trains. All the decree does is to require of the company the performance of the same service for relator that it has extended to others

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notably the Western Union Telegraph Company. The evidence establishes that poles and materials for the construction, repair, and maintenance of the Western Union lines have been distributed by the cars of plaintiff company between stations, and that this has been going on for years, and still goes on. It also establishes that it has been constantly the practice of defendant company to deliver freight for planters and others between stations, and to receive for transportation, at points between stations, rice, sugar, etc. This being shown, it is held that the company may not discriminate, and, when called upon under conditions that are reasonable, must perform the like service for relator; and the duty, being of a public nature, is enforceable by *mandamus*. The evidence also shows that the same service herein required of defendant company has been freely accorded this relator and others by other railroad companies over their lines in this and other states. Relator, it appears, owns its own cars, on which are loaded its telephone and telegraph poles. It applied to defendant company to haul these cars over its lines between New Orleans and Shreveport and throw the poles off, or permit them to be thrown off, at convenient distances. Other railroad companies, operating lines of railway into and out of New Orleans, had done this, and defendant company does the same for the Western Union Telegraph Company, a rival line. It refused the service to relator. That it is the province of the court to say to this common carrier, "What you do for others you cannot refuse to relator," cannot, we think, be seriously questioned. And in so saying, and enforcing by its writs the performance of the duty, it is not apparent that defendant company is denied any of the rights, privileges, and immunities granted to it by the several acts of congress referred to in the application for rehearing and in the briefs filed on its behalf. The rehearing applied for is denied.

Illinois Cent. R. Co. v. Bogard

ILLINOIS CENT. R. CO.

v.

BOGARD *et al.**(Supreme Court of Mississippi, May 14, 1900.)*

Carriers of Freight—Liability for Failure to Deliver.—Nothing exonerates a carrier from the obligation to deliver the freight at the point of destination, except the act of God or the public enemy, or the conduct of the shipper.

Nondelivery of Freight—Damages.*—The measure of damages for nondelivery of freight is its value at the place of destination.

Same—Limiting Liability.†—A common carrier of freight cannot validly contract for exemption from damages arising out of its own negligence, even to the extent of limiting its liability to the value of the freight at the place of shipment.

Same—Notice of Claim—Waiver.—A clause in the contract of affreightment that a claim for damages to the cattle shipped shall not be valid, unless in writing, sworn to, and delivered to the carrier's agent within 10 days after knowledge of the injury, cannot be taken advantage of by the carrier, where the agent was written to in regard to the claim, and the shipper received several letters in reply, in none of which was any question made of the claim not being sworn to.

APPEAL by defendant from Lafayette county circuit court.
Affirmed.

The special contract under which the stock was shipped contained the following stipulations: "And the liability of the company for any loss or damage for which it may be responsible shall not exceed the actual cost at the point of

*See *note*, 10 Am. & Eng. R. Cas., N. S., 861.

†See *note*, 7 Am. & Eng. R. Cas., N. S., 573 *et seq.*; *Kellerman v. K. C., etc., R. C. (Mo.)*, 3 Am. Eng. R. Cas., N. S., 290; *J. J. Douglas Co. v. Minn. T. Ry. Co. (Minn.)*, 2 Am. & Eng. R. Cas., N. S., 671; *St. Louis, etc., Ry. Co. v. Sherlock (Kan.)*, 9 Am. & Eng. R. Cas., N. S., 462; *Cincinnati, etc., Ry. Co's Receiver v. Graves (Ky.)*, 16 Am. & Eng. R. Cas., N. S., 177; *Loeser v. Chicago, etc., Ry. Co. (Wis.)*, 8 Am. & Eng. R. Cas., N. S., 421.

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shipment, and in no event exceed the above valuation for each animal. It is further agreed by the shipper that no claim for loss or damage to stock shall be valid against said railroad company unless it shall be made in writing, verified by affidavit, and delivered to the general freight agent of the railroad company, or to the agent of the company at the point from which the stock is shipped, or to the agent of the company at the point of destination, within ten days from the time that the said stock is removed from said cars."

Mayes & Harris, for appellant.

James Stone, for appellees.

CALHOON, J. Nothing exonerates a carrier from the obligation to deliver the freight in his charge at the point of destination, except the act of God or the public enemy, or the conduct of the shipper. *Express Co. v.*

Moon, 39 Miss. 822; *Gilmore v. Carman*, Carriers of Freight—Liability for Failure to Deliver.

1 *Smedes & M.* 279; *Neal v. Saunderson*, 2

Smedes & M. 572; *Railroad Co. v. Weiner*, 49 Miss.

725. Of course, this rule is subject to modification in cases where loss or damage occurs, occasioned by the nature of the freight itself. Nor are we to be understood as holding that the carrier might not be exonerated where the loss was the result of some outside force,—*vis major*,—not technically to be classed as that of the public enemy. Aside from this, it is an insurer. The measure of damages for nondelivery is the value of the freight at the place of destination. *Jamison v. Moon*, 43 Miss. 598. A carrier cannot protect against liability for losses caused by its own negligence.

The limit of such contract exemption is as Nondelivery of Freight—Damages.

against casualties and accidents which prudence cannot provide against. See the authorities cited in the admirable Digest of Messrs. Brame and Alexander, on page 120. The case of *Railroad Co. v. Langdon*, 71 Miss. 146, 14 South. 452, is not in conflict with the rule, as the concluding clause of it shows. The record in that case discloses no proper proof of value of the cattle either at the place of shipment or the place of destination. Be this as it may, we

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now reannounce the true rule to be that a common carrier cannot validly contract for exemption from damages arising out of its own negligence, even to the extent of limiting its liability to account for values at the place of shipment. Where there is a clause in the contract of affreightment that a claim for damages to cattle shall not be valid, unless in writing, sworn to, and delivered to the agent within 10 days, the carrier cannot avail of it to escape, where, as in this case, its agent was written to, and answered that he had referred it for investigation, and the shipper received two other letters on this subject, and in none of them was any question made of the claim not being sworn to. We see no reason for not applying the same rule that has been so often applied in reference to proofs of loss in insurance matters, and we do so apply it. The correspondence mentioned is in evidence, undisputed, and the court had the right to treat it as a fact established, in instructing the jury. The most liberal charges were given for appellant, and we cannot properly disturb the verdict on the evidence. Affirmed.

Same—Limiting
Liability.Same—Notice of
Claim—Waiver.

COOPER

v.

RALEIGH & G. R. Co. *et al.**(Supreme Court of Georgia, May 16, 1900.)*

Common Carriers—Liability for Loss of Goods.—A common carrier of goods is excused from liability for loss of or damage to such property only in the event loss or damage results from the act of God or of the public enemy.

Carriage of Live Stock—Liability.*—While a common carrier of goods, who also transports live stock, is, as to the latter property, a common carrier, certain exceptions have grown up in his favor,

*See notes at end of case.

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exempting him from liability for loss or injury caused by the nature and propensity of the animals.

Same—Presumption of Negligence.*—In the trial of an action brought against a carrier of live stock to recover damages for loss of or injury to stock which he had undertaken to transport, after proof of loss or injury there is a presumption of law that he was at fault, and the burden rests upon him of showing that he is not liable, by reason of the happening of some cause which the law recognizes as an excuse.

Same—Right to Limit Liability.—A carrier of live stock may by special contract so limit his liability for loss or damage that he will be liable only in the event he is guilty of "gross negligence."

Same—Unloading—Special Contract.—When, in such a contract, it was provided that the shipper should "unload [the] stock [with the assistance of the company's agent or agents] at his * * * own risk," it is the duty of the shipper either to be present himself, or have some one representing him present, at the unloading of the stock; and, in the trial of a suit in which the carrier relied on such a contract as a defense, it is not error to so charge the jury, if they are also instructed that a failure of the shipper to be present, or have some one present in his behalf, would not defeat a recovery by him unless it appeared that the damages claimed resulted from such failure.

(Syllabus by the Court.)

ERROR by plaintiff from Athens city court. *Reversed.*

Henry C. Tuck, for plaintiff in error.

Erwin & Brown, for defendants in error.

COBB, J. The plaintiff brought an action against the defendants to recover damages on account of injuries which it was alleged had been inflicted, by the negligence of the servants of the defendants, on certain live stock which they had undertaken to transport for the plaintiff from Atlanta to Athens. See *Cooper v. Railroad Co.*, 105 Ga. 83, 30 S. E. 731. The petition set forth two elements of damage. It was alleged first that one mule worth a stated sum had been rendered practically worthless by having one leg broken; this injury resulting from the mule getting its foot hung in the open latticework forming the side of the car in which the stock were shipped. The other element of damage was alleged to have arisen from the conduct of the defendants in

*See notes at end of case.

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unloading the stock at Athens, after the hour of midnight, into an open pen or inclosure, while the weather was very cold, and a strong, biting wind or blizzard was blowing, in which inclosure the stock remained the balance of the night, and from such exposure they contracted distemper, and on account of this were injured and damaged in a stated sum. the defendants answered, denying the material allegations of the petition. The case went to trial, and a verdict was returned in favor of the defendants. The plaintiff's motion for a new trial having been overruled, he sued out a bill of exceptions to this court, complaining of the refusal of the court to grant him a new trial.

1. One ground of the motion for a new trial complains that the judge, in his charge to the jury, improperly placed upon the plaintiff the burden of proving that the defendants were negligent, notwithstanding it had been shown that the injury to the stock had arisen while they were in the possession of the defendants. Under the common law, a common carrier was liable absolutely and at all events to deliver the property which it had undertaken to carry safely to the consignee or owner, and was excused from liability only when the loss or injury was caused by an act of God or the public enemy, or the shipper's negligence. 6 Am. & Eng. Enc. Law (2d Ed.) p. 263; Fish v. Chapman, 2 Ga. 349; Cooper v. Berry, 21 Ga. 535. The statute of this state is to the same effect. Civ. Code, § 2264. The transportation of live stock over land was, however, unknown to the common law, and consequently the liability of carriers of live stock is not to be determined by the strict common-law rule. Railroad Co. v. Spears, 66 Ga. 485; Pardington v. Railway Co., 38 Eng. Law & Eq. 432; 2 Ror. R. R. pp. 1301, 1302. By statute (17 & 18 Vict. c. 31, § 7), carriers of live stock were in England made liable as common carriers. While there has been some doubt as to whether carriers of live stock were common carriers, it seems to be well settled now that they are. Hutch. Carr.

Common
Carriers—
Liability for
Loss of
Goods.

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§§ 217, 218; 5 Am. & Eng. Enc. Law (2d Ed.) 428; and cases cited in each.

2. While carriers of live stock are common carriers, certain exceptions have grown up in their favor, arising from the nature of the property transported. Among these exceptions are the natural death of the animals, the vicious and uncontrollable nature of the stock, and similar exceptions. Such causes are within the principle which excuses common carriers from loss or damage resulting from the act of God. They are causes which arise from the nature and propensity of the animals, and which could not be prevented by foresight, vigilance, and care. Hutch. Carr. § 216a; 5 Am. & Eng. Enc. Law (2d Ed.) p. 443. Such exceptions as these were clearly recognized in the case of Railroad Co. v. Spears, cited above; holding that carriers of live stock were common carriers.

Carriage of
Live Stock—
Liability.

3. It being settled that a carrier of live stock is a common carrier, and entitled to the privileges of, and, with the exceptions just referred to, subject to the penalties imposed on such a carrier, the question arises as to whether, under our law, in a case like the present, the burden of showing negligence is on the plaintiff, or whether it is incumbent on the carrier to show that the fail-

Same—Presump-
tion of Negli-
gence.

ure to deliver the stock in good order was attributable to some cause which the law recognizes as an excuse for such failure. The Code declares that "in case of loss the presumption of law is against [a common carrier], and no excuse avails him unless it was occasioned by the act of God or the public enemies of the state" (Civ. Code, § 2264), and also that "a railroad company shall be liable for damage done to persons, stock or other property of such company, or for damages done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company" (Civ. Code, § 2321). It would follow that in a suit against a rail-

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road company, acting as a common carrier of live stock, for damages alleged to have resulted from the way in which the stock were transported, when the plaintiff has shown a delivery of the stock to the company, and loss of or injury to the stock while in the possession of the company, the law would raise a presumption that such loss or injury resulted from the defendant's negligence, and the burden would be upon the defendant to show that the loss or injury was the result of some cause which would, under the law, be an excuse for a failure to deliver the stock in good order. The defendants contend, however, that, even if the charge of the judge on the subject of the burden of proof was erroneous, it was harmless, for the reason that the defendants actually assumed the burden of showing that they were without fault. But, even if this is true, harm might have resulted from the judge's charge. It is impossible to tell from the jury's verdict whether they based the same on the testimony for the defendants, which, it is claimed, established they were without fault, or on an opinion which they entertained that the plaintiff had failed to successfully carry the burden which the court had improperly placed upon him. Under the judge's charge, if the jury believed that the plaintiff did not by his testimony show the defendants in fault, a verdict for the defendants would naturally result, even though they introduced no evidence whatever. We think, therefore, that the error of the judge in improperly placing the burden of proof was of such a character as to require a new trial.

4. Carriers of live stock may limit their liability by a special contract, which will be enforced if based upon a sufficient consideration, and if not unreasonable, immoral, or contrary to public policy. *Railroad Co. v. Spears*, 66 Ga. 485; *Railroad Co. v. Bryant*, 73 Ga. 722; *Railway Co. v. Dishbrow*, 76 Ga. 253; *Banking Co. v. Reid*, 91 Ga. 377, 17 S. E. 934; *Hutch. Carr.* § 225 *et seq.*; 5 Am. & Eng. Enc. Law (2d Ed.) pp. 288, 441. In the present case the defendants introduced in evidence a contract of shipment entered into between them and the plaintiff,

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Limit Liability.

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whereby the plaintiff agreed to release the defendants from liability in case of loss or injury to the stock by reason of a number of named causes, "and from all other causes incidental to railroad transportation, and which shall not have been caused by the fraud or gross negligence of said railroad companies." Under this contract the defendants were required to exercise only slight diligence, and were liable only for gross negligence, and an instruction to the jury to this effect was not erroneous. In *Railroad Co. v. Spears*, *supra*, it was held that a contract almost identical in language with the one now under consideration was enforceable, as it was "neither impossible, unreasonable, nor illegal." The contract under consideration in that case was also held to be based upon a sufficient consideration; the consideration being a reduction in freight, and a free passage to the owner. This was also the consideration of the contract involved in the present case. Of course, a common carrier cannot make a valid contract exempting him from liability altogether when the damage is caused by his own negligence. *Berry v. Cooper*, 28 Ga. 543; *Purcell v. Express Co.*, 34 Ga. 315. But this is a different thing from limiting by contract his liability for damage caused by his gross negligence only. *Hutch. Carr.* § 229, and cases cited. There was therefore no error in the charge complained of, and the defendants may excuse themselves by showing that they exercised the degree of diligence the contract requires. The provisions of sections 2313 and 2314 of the Civil Code, which prohibit common carriers from enforcing or requiring consignors of live stock "to contract for a liability less than the actual value of such animals in case of loss or injury to the same resulting from the negligence" of the carrier, and declaring that all such stipulations in contracts of shipment shall be void "unless the shipper shall voluntarily assent to" such stipulations, have no bearing upon the present case, for the reason that, so far as the present record discloses, there was no effort to recover any amounts

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larger than those stipulated in the contract of shipment. But, even if there had been, there was evidence tending to prove that the shipper voluntarily assented to all the stipulations in the contract of shipment. The fact that there was in the present case a special contract would not take it out of the rule that, after the plaintiff has proven that the stock were lost or injured while in the possession of the defendants, the law would raise a presumption that the defendants were at fault. Such a presumption would in such a case arise, and the burden would be then placed upon the defendants to show that they had exercised the degree of diligence which the contract required. *Railway Co. v. Kennedy*, 78 Ga. 653, 3 S. E. 267.

5. The contract entered into between the plaintiff and the defendants provided that the plaintiff should "unload said stock [with the assistance of the company's agent or agents] at his or their own risk, and feed, water, and attend the same at his own expense and at his own risk while in the stock yard of said company, or at the transfer points, or where it may be unloaded for any purpose." The court charged the jury that it was the duty of the plaintiff, under the contract, to have been present at the unloading of the stock, and this is assigned as error. There was no error in this charge. See *Banking Co. v. Reid*, 91 Ga. 377, 17 S. E. 934. Of course, the failure of the plaintiff to be present would not of itself prevent him from recovering, but, if the loss or damage was the result of his not being present, he could not recover.

The foregoing deals with all of the assignments of error which are of sufficient importance to be discussed at length, or which relate to matters which will probably arise at another trial. As the case goes back for another hearing, no opinion on the evidence is expressed. If the defendants fail to overcome the presumption of law that they were guilty of gross negligence in the way in which they transported, took care of, and delivered the stock, which presumption would arise as soon as the plaintiff shows that the stock were injured

Same—Unloading—Special Contract.

Notes

while in the possession of the defendants, a recovery in behalf of the plaintiff for the damage he has sustained would not be unwarranted. If, on the other hand, the defendants should show by evidence that they have exercised all that care and diligence which their contract of shipment required of them, the plaintiff would not be entitled to recover. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

NOTES.

Carriers of Live Stock—Liability for Injuries Occasioned by the Inherent Nature or Propensities of the Animals.—The general rule of the absolute liability of a common carrier for the safe transportation and delivery of property committed to it for carriage is applicable, although the property consists of live stock, but subject to the exception that it is not an insurer against injuries resulting from the inherent nature or propensities of the animals, and without fault of the carrier. *Lindsley v. Chicago, M. & St. P. R. Co.*, 31 Am. & Eng. R. Cas. 86, 36 Minn. 539, 33 N. W. Rep. 7; *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 49 Am. & Eng. R. Cas. 154; *Mich. Central R. Co. v. Myrick*, 107 U. S. 102, 9 Am. & Eng. R. Cas. 25; *Western R. of Ala. v. Harwell*, 91 Ala. 340, 45 Am. & Eng. R. Cas. 358, 8 So. Rep. 649; *East Tenn., &c., R. Co. v. Johnston*, 75 Ala. 596, 22 Am. & Eng. R. Cas. 437, 51 Am. Rep. 489; *Richmond, etc., R. Co. v. Trousdale*, 99 Ala. 389, 42 Am. St. Rep. 69, 55 Am. & Eng. R. Cas. 401; *Agnew v. Contra Costra* 27 Cal. 425; *Union Pac. R. Co. v. Rainey*, 19 Colo. 225, 61 Am. & Eng. R. Cas. 302; *Couplaud v. Housatonic R. Co.*, 61 Conn. 531, 55 Am. & Eng. R. Cas. 380; *Georgia R. Co. v. Spears*, 66 Ga. 489, 42 Am. Rep. 81; *Georgia R. Co. v. Beattie*, 66 Ga. 438, 42 Am. Rep. 75; *St. Louis, &c., R. Co. v. Dorman*, 72 Ill. 504; *Ohio, etc., R. Co. v. Dunbar*, 20 Ill. 623, 71 Am. Dec. 291; *McCullom v. Indianapolis, etc., R. Co.*, 94 Ill. 534; *Lake Shore, etc., R. Co. v. Bennett*, 89 Ind. 457, 6 Am. & Eng. R. Cas. 391; *Kinnick v. Chicago, &c., R. Co.*, 69 Iowa 665, 27 Am. & Eng. Cas. 55; *St. Louis & S. F. R. Co. v. Clark*, 48 Kan. 321, 55 Am. & Eng. R. Cas. 367; *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kan. 645, 16 Am. & Eng. R. Cas. 158, 46 Am. Rep. 104; *Louisville, &c., R. Co. v. Hedger*, 9 Bush (Ky.) 645; *Pitre v. Offutt*, 21 La. Ann. 697, 99 Am. Dec. 749; *Peters v. New Orleans, &c., R. Co.*, 16 La. Ann. 222; *Dow v. Portland Steam Packet Co.*, 84 Me. 490; *Sager v. Portsmouth, &c., R. Co.*, 31 Me. 228; *Evans*

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v. Fitchburg R. Co., 111 Mass. 142; *Squire v. N. Y. Central R. Co.*, 98 Mass. 239; *Boehl v. Chicago, M. & St. P. R. Co.*, 44 Minn. 191, 45 Am. & Eng. R. Cas. 351; *Moulton v. St. Paul, &c., R. Co.*, 31 Minn. 85, 12 Am. & Eng. R. Cas. 13; *Chicago, etc., R. Co. v. Abela*, 60 Miss. 1017, 21 Am. & Eng. R. Cas. 105; *Dawson v. St. Louis, &c., R. Co.*, 76 Mo. 514; *Oxley v. St. Louis, etc., R. Co.*, 65 Mo. 629; *Black v. Chicago, etc., R. Co.*, 30 Neb. 197, 45 Am. & Eng. R. Cas. 351, *note*; *Atchison, &c., R. Co. v. Washburn*, 5 Neb. 117; *Rixford v. Smith*, 52 N. H. 355, 13 Am. Rep. 42, 67 Am. Dec. 210; *Feinberg v. Delaware, etc., R. Co.*, 52 N. J. L. 451, 45 Am. & Eng. R. Cas. 348; *Holsapple v. Rome, etc., R. Co.*, 86 N. Y. 275, 3 Am. & Eng. R. Cas. 487; *Clarke v. Rochester, &c., R. Co.*, 14 N. Y. 570, 67 Am. Dec. 210; *Lee v. Raleigh, etc., R. Co.*, 72 N. Car. 236; *Welsh v. Pittsburgh, &c., R. Co.*, 10 Ohio St. 72; *Wilson v. Hamilton*, 4 Ohio St. 722; *Powell v. Pennsylvania R. Co.*, 32 Pa. St. 414; *Bamberg v. South Car. R. Co.*, 9 S. Car. 61, 30 Am. Rep. 13; *Louisville, &c., R. Co. v. Wynn*, 88 Tenn. 320, 45 Am. & Eng. R. Cas. 312; *Ft. Worth & D. C. R. Co. v. Greathouse*, 82 Tex. 104, 49 Am. & Eng. R. Cas. 157, 17 S. W. Rep. 834; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 28 Am. & Eng. R. Cas. 107; *Kimbal v. Rutland, &c., R. Co.*, 26 Vt. 247, 62 Am. Dec. 567; *Virginia, &c., R. Co. v. Sayers*, 26 Gratt. (Va.) 328; *Maslin v. Baltimore, &c., R. Co.*, 14 W. Va. 180, 35 Am. Rep. 748; *Ayres v. Chicago, &c., R. Co.*, 71 Wis. 372, 35 Am. & Eng. R. Cas. 679, 5 Am. St. Rep. 226; *Morrison v. Construction Co.*, 44 Wis. 405, 28 Am. Rep. 599.

Another statement of the rule is that the common-law rule making common carriers of merchandise liable as insurers, except for injury or loss resulting from the act of God or the public enemy, is modified as to carriers of live stock, to the extent of relieving them from liability for injuries or loss resulting by reason of the vitality of the freight. *Cragin v. New York C. R. Co.*, 51 N. Y. 61, 4 Am. Ry. Rep. 418; *Dow v. Portland Steam Packet Co.*, 84 Me. 490, 24 Atl. Rep. 495; *Hayman v. Philadelphia & R. R. Co.*, 8 N. Y. S. R. 86; *Chicago, R. I. & P. R. Co. v. Harmon*, 12 Ill. App. 54.

Same—Same—What Are Injuries Resulting from Inherent Nature or Propensities of Animals for Which Carrier Is Not Liable.—The shipper assumes all the ordinary risks of transportation and all injury which resulted from the cramped and crowded condition of the cattle, from their restiveness, viciousness, exhaustion, hunger, and thirst during their transportation, and also from the jars and concussions incident to starting and stopping the train. *Heller v. Chicago & G. T. R. Co.*, 109 Mich. 58, 3 Am. & Eng. R. Cas., N. S., 599, 66 N. W. Rep. 667.

"In case of injury to living animals which may be caused by each other, or by the inherent liability to sickness and death or self-in-

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flicted injury in close confinement, if the carrier does all towards their safe carriage which should be done and still injury results, no responsibility should be fastened on the carrier." *Chicago, &c. R. Co. v. Abels*, 60 Miss. 1017, 21 Am. & Eng. R. Cas. 105.

When it appears that the car in which a mule was carried was suitable, that the track was in good condition, that the equipments and appliances of the train were adequate, and that there was no fault, negligence, or want of care in any respect on the part of the carrier in handling the stock or in the running or management of the train, the carrier is not liable for damages to a mule which had its hoof torn off in transit from some unexplained cause. *Louisville, N. O. & T. R. Co. v. Bigger*, 66 Miss. 319, 38 Am. & Eng. R. Cas. 373.

The following are further instances in which the carrier has been excused for an injury or loss resulting from the intrinsic qualities and propensities of the live stock transported: Where a horse's shoes were not removed, or a halter was attached to his jaw in such a manner as to cause restiveness. *Evans v. Fitchburg, etc., R. Co.*, 111 Mass. 42. Where an animal dies or is injured by heat or cold, or want of food while in course of transportation, without any negligence on the part of the carrier. *Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 180; *Kirby v. Gt. Western, etc., R. Co.*, 18 L. T., N. S., 658. Where one of a pair of horses kicks and kills or injures the other in the car, if the car was suitable, and proper care was taken to prevent such injuries. *Evans v. Fitchburg, etc., R. Co.*, 111 Mass. 142. Where a mule being transported in a railroad car, kicks through the slats at the side of the car and is killed, without fault of the carrier, it being the nature of the mule to kick. *Indianapolis, etc., R. Co. v. Jurey*, 8 Ill. App. 160. Where an unruly jackass is thrown or falls off a ferry boat, through his own restlessness or viciousness, the ferry-men being guilty of no negligence. *Hall v. Renfro*, 3 Metc. (Ky.) 51. Where the animal takes fright, after the journey is ended, at a light displayed by a servant of the company, and dashes upon the track and is killed. *Roberts v. Great Western, etc., R. Co.*, 4 Ad. & El., N. S., 506. Where a bullock escapes by his own exertions from the truck in which he is being transported, without negligence by the carrier, the truck itself being sufficient, and is lost. *Blower v. Gt. Western, etc., R. Co.*, L. R. 7 C. P. 655; 41 L. J. C. P. 268; 27 L. T. N. S. 883; 20 W. R. 776. Where an animal while being carried perishes partly through its own unruly conduct and partly from the effects of a storm, the carrier being chargeable with no negligence. *Nugent v. Smith*, L. R. I. C. P. Div. 423. Where horses being transported by water, in consequence of a storm, break down the partitions between them, and by kicking each other some of them are killed. *Gabay v. Lloyd*, 3 B. & C. 793; *Lawrence v. Aberdeen*, 5 B. & Ald. 107.

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A carrier of live stock is not liable for a loss or injury that results from overexertion or overheating of the animal from its own disposition, which is unprovoked by any misconduct of the carrier or its servants. *Chicago, B. & Q. R. Co. v. Owen*, 21 Ill. App. 339.

Where the Injury Is Caused by Combined Negligence of the Carrier and the Nature and Propensities of the Live-stock.—Where the negligence of the carrier is the primary cause of the injury, although but for the nature and propensities of the live stock carried no loss would have resulted, the carrier is responsible. *Powell v. Pennsylvania R. Co.*, 32 Pa. St. 414; *Ritz v. Pennsylvania R. Co.*, 3 Phila. 82; *East Tenn., etc., R. Co. v. Whittle*, 27 Ga. 535; *Ohio, etc., R. Co. v. Dunbar*, 20 Ill. 623; *St. Louis, etc., R. Co. v. Dorman*, 72 Ill. 504; *Indianapolis, etc., R. Co. v. Strain*, 81 Ill. 504; *Welch v. Pittsburgh, etc., R. Co.*, 10 Ohio St. 65; *Great Western, etc., R. Co. v. Hawkins*, 18 Mich. 427; *S. C. 17 Mich. 57*; *Clarke v. Rochester, etc., R. Co.*, 14 N. Y. 570; *Conger v. Hudson River, etc., R. Co.*, 6 Duer. (N. Y.) 375; *Harris v. Northern, etc., R. Co.*, 20 N.Y. 232; *Smith v. New Haven, etc., R. Co.*, 12 Allen (Mass.) 531; *Evans v. Fitchburg, R. Co.*, 111 Mass. 142; *Pratt v. Ogdensburg, etc., R. Co.*, 102 Mass. 557; *Rhodes v. Louisville, etc., R. Co.*, 9 Bush (Ky.) 688; *Peters v. New Orleans, etc., R. Co.*, 16 La. Ann. 222.

Where the contract of transportation contained a clause providing that the carrier should be free from liability for any accident occasioned by the animals' restiveness, and an accident occurred through such restiveness, but the latter resulted from the negligence of the railroad company. *Moore v. Great Northern, etc., R. Co.*, L. R. 10 Irish, 95; *Gill v. Manchester, etc., R. Co.*, 42 L. J. Q. B. 89; L. R. 8 Q. B. 186. See also *Kendall v. London, etc., R. Co.*, L. R. 7 Ex. 373. Where hogs in course of transportation become heated from being overcrowded and the carrier when informed of the fact neglected to apply water to them, alleging that his pump was out of repair. *Illinois, etc., R. Co. v. Adams*, 42 Ill. 474. See also *Toledo, etc., R. Co. v. Thompson*, 71 Ill. 434.

Where, by leaving a car window open, or like negligence, in consequence of which the animals escape, even though the contract expressly stipulates against liability for escapes. *Indianapolis, etc., R. Co. v. Allen.*, 31 Ind. 394.

Effect of Delay on Propensities of Animals—Liability of Carrier.—A carrier is liable for all damage that is referable to the natural effect of a negligent delay in transportation upon the normal condition or latent propensities of the animals, whereby they are reduced in weight or strength more than they would have been if prompt carriage and delivery had been made. *Richmond & Danville R. Co. v. Trousdale & Sons (Ala.)*, 55 Am. & Eng. R. Cas.

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400, 13 So. Rep. 23; Galveston, etc., R. Co. v. Herring (Tex. Civ. App.), 36 S. W. Rep. 129.

So where, owing to the wreck of a passenger train, a car-load of hogs was delayed twelve hours without being unloaded or receiving attention, and injury resulted from "piling up" of the animals, or their struggling to get near to or away from the car doors, which propensity is only exhibited when the train is standing. Kinnick v. Chicago, etc., R. Co., 69 Iowa 665, 27 Am. & Eng. R. R. Cas. 55. Where, because of an unreasonable or negligent delay, animals perish of cold. Moulton v. St. Paul, etc., R. Co., 31 Minn. 85, 12 Am. & Eng. R. R. Cas. 13.

Burden on Carrier to Prove Cause of Injury.—In an action for the death of live-stock in the course of transportation, and wholly under the care of the carrier, the burden of proof is upon the defendant to show that the cause of the death was within the exception qualifying its general liability. Lindsley v. Chicago, M. & St. P. R. Co., 36 Minn. 539, 31 Am. & Eng. R. Cas. 86; Western Ry. v. Harwell, 91 Ala. 340, 45 Am. & Eng. R. Cas. 358; Dow v. Portland S. P. Co., 84 Me. 490, 24 Atl. Rep. 945; Hull v. Chicago, etc., R. Co., 41 Minn. 510, 40 Am. & Eng. R. Cas. 104, 16 Am. St. Rep. 722; Missouri Pac. R. Co. v. Texas, etc., R. Co., 41 Fed. Rep. 913; Johnson v. Alabama & V. Ry. Co., 69 Miss. 191, 11 So. Rep. 104; Hinkle v. Southern Ry. Co. (N. Car.), 36 S. E. 348; Chapin v. Chicago, etc., R. Co., 79 Iowa 582; Mitchell v. Carolina Cent. R. Co. (N. Car.), 13 Am. & Eng. R. Cas., N. S., 201; Schaeffer v. Philadelphia, etc., R. Co., 168 Pa. St. 209, 47 Am. St. Rep. 884; Giblin v. Nat. Steamship Co., 8 Misc. Rep. (N. Y.) 22.

At common law, a common carrier could relieve itself from liability for the loss of property intrusted to it for transportation, only by showing that the loss was caused by the act of God or the public enemy, or that it resulted from the inherent nature of the thing itself. In other words, to escape liability, the burden was upon the carrier to bring itself within one of the exceptions recognized by law. The rule is the same now, except that in this day of special contracts it has been relaxed so that the carrier may exonerate itself from responsibility by either showing that the case falls within one of the exceptions of the common law, or within one of the stipulations of the special contract. Louisville & N. R. Co. v. Wynn, 88 Tenn. 320, 45 Am. & Eng. R. Cas. 312; Chicago, etc., R. Co. v. Abels, 60 Miss. 1017, 21 Am. & Eng. R. Cas. 105.

Where live stock were shipped under a contract relieving the company from liability as to certain specified causes, and an injury occurred, the burden of proof is on the carrier to show not only that the cause of the injury is within the exceptions, but that the injury

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was without negligence on the part of the defendant. *East Tenn., V. & G. R. Co. v. Johnston*, 22 Am. & Eng. R. Cas. 437, 75 Ala. 596, 51 Am. Rep. 489.

Where a carrier of live stock seeks to escape liability for loss and injury thereto, on the ground that the cattle were injured by their inherent viciousness and disposition to hurt each other, the burden is upon him to prove these facts. *Ft. Worth & D. C. R. Co. v. Great-house*, 49 Am. & Eng. R. Cas. 157, 82 Tex. 104, 17 S. W. Rep. 834.

An instruction that injury to live stock, in the custody of a common carrier for shipment, raises a presumption of negligence against the carrier should have been qualified by adding: "Except such injury as results or may have resulted from the negligence of the shipper or the inherent vice or propensity of the animal" as the shipper loaded and tended the cattle in question at his own risk, and the evidence tended to show that he was negligent in performing this work. *Norfolk & W. Ry. Co. v. Reeves (Va.)*, 16 Am. & Eng. R. Cas., N. S., 166.

In *Hussey v. The Saragossa*, 3 Woods 380, Fed. Cas. No. 6,949, it was held that, when the damage to the thing shipped is apparently the result of its inherent nature or inherent defects, the shipper must show something more than its damaged condition before the carrier can be called on to explain. He must show some injury to the thing shipped which cannot be the result of its inherent nature or defects, before the burden is cast upon the carrier to show that he is not in fault. See, also, *Smith v. Railway Co.*, 57 Law T. (N. S.) 813; *Elliott, R. R.* pp. 2345-2349; *Clarke v. Railroad Co.*, 67 Am. Dec. 205; *Railroad Co. v. Raiordon*, 119 Pa. St. 577, 13 Atl. 324.

Burden of Proof Where Shipper Has Charge.—Ordinarily the burden of proof is on the carrier to account for stock delivered to it and lost during transit, but in case of special contract whereby the owner agrees to take charge of the stock, the burden of proving negligence on the part of the carrier is upon him. *McBeth v. Wabash, St. L. & P. R. Co.*, 20 Mo. App. 445.

Where the owner of live stock contracts to load and unload and to take care of the stock during transit, the burden of proving negligence on the part of the carrier, causing a loss or injury to the stock, is on the owner. *Clark v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 440, 17 Am. Ry. Rep. 284.

Where the property which a railroad company agreed to carry was live stock, and the owner undertook, by special contract entered into with the company, to go with the stock and care for it, he is bound to show that the injury or loss for which he is seeking to recover damages was not attributable to the failure to perform or the negligent or improper performance of acts which he undertook

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to perform. He must show that the injury was caused by the carrier's breach of duty. *Terre Haute & L. R. Co. v. Sherwood*, 55 Am. & Eng. R. Cas. 326, 132 Ind. 129, 31 N. E. Rep. 781.

The doctrine was thus asserted in *Louisville, C. & L. R. Co. v. Hedger*, 9 Bush (Ky.) 645: "Where the owner contracts, however, to load and unload his stock, and to take charge of them during transportation, as in this case, and does in fact do so, the burden of proof, where the company is charged with negligence for the loss or injury to the stock is upon the owner, as the party who has the care of the property is presumed to know how the injury occurred, and must himself suffer the loss unless negligence is shown on the part of the carrier or his employees." *Louisville & N. R. Co. v. Martin*, 8 Ky. L. Rep. 432; *C. & T. P. Ry. Co. v. Grover*, 11 Ky. L. Rep. 236; *Clark v. St. Louis, etc., Ry. Co.*, 64 Mo. 440; *Texas & P. R. Co. v. Arnold*, 16 Tex. Civ. App. 74, 40 S. W. 829; *Grieve v. Illinois C. R. Co. (Iowa)*, 9 Am. & Eng. R. Cas., N. S., 669; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397, 35 Am. & Eng. R. Cas. 635, 7 Am. St. Rep. 104.

Burden of Proof Where Carrier Has Contracted for Exemption from Negligence.—See extensive *note*, 10 Am. & Eng. R. Cas., N. S., 335 *et seq.*; *Mitchell v. Carolina Cent. R. Co. (N. Car.)*, 13 Am. & Eng. R. Cas., N. S., 201.

SOUTHERN RY. CO.

v.

ATLANTA RAPID-TRANSIT CO.

(*Supreme Court of Georgia, Aug. 7, 1900.*)

Street Railways—Charters.—Even if the provisions of Civ. Code, § 2219, are applicable to the crossing by a street railroad of any other railroad, the phrase, "heretofore or hereafter chartered by the legislature of this state," embraces a street-railroad company whose charter, though granted by the secretary of state, has been confirmed and made valid by an act of the general assembly. A company having such a charter may properly be termed one "chartered by the legislature."

Same—Additional Servitudes.—No new burden or servitude is imposed upon a public street or highway by constructing and operating

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therein a street railway for the transportation of passengers, the cars of which are propelled by electric power.

Same—Right to Cross Other Railway.*—That a street-railway company has, under its charter, authority to use steam as well as electricity as a motive power, is a matter of no consequence in testing its right in a given instance to cross a railway on a street under a municipal grant restricting the company to the use of electric power, and where it is not seeking to employ steam power.

Same—Right to Use Street—Implied Conditions.—A railroad corporation which is permitted to construct its tracks across an existing city street or public road does so subject to the condition that it must submit to the increased inconvenience to it which may result from the growth and development of the city or country, and the consequent increase of travel in the usual methods along such street or road.

Same—Right to Cross Tracks of Steam-Railroad Company—Eminent Domain.*—A company owning and operating a street railway of the character above indicated may, under the permission of the proper municipal or county authorities, construct its lines across the track of a steam-railroad company, and use the same, without instituting condemnation proceedings, or being required to pay damages. (Syllabus by the Court.)

ERROR by plaintiff from Fulton county superior court.
Affirmed.

Dorsey, Brewster & Howell and H. A. Alexander, for plaintiff in error.

Goodwin & Hallman, John L. Hopkins & Sons, Rosser & Carter, King & Spalding, and Brandon & Arkwright, for defendants in error.

LEWIS, J. The Southern Railway Company brought suit in the superior court of Fulton county against the Atlanta Railway & Power Company and the Atlanta Rapid Transit Company, corporations owning and operating lines of street railway in Fulton county, and in the city of Atlanta. The petition, in substance, alleged that plaintiff was in possession of, owned, and operated two lines of railroad, among others, leading from the city of Atlanta in a southeasterly direction, one running to the town of Ft.

*See notes at end of case.

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Valley, in said state, and the other to the city of Brunswick, Ga., and each ran through Fulton county, and crossed what is known as the "McDonough Public Road" at grade level on said public road at a place designated as Henderson's Crossing," in the county of Fulton. In the transaction of its business it was obliged to run and does run across said McDonough public road upon the lines of its railway a great many passenger and freight trains every day, and this renders Henderson's crossing an exceedingly dangerous and hazardous one. It alleges that the Atlanta Railway & Power Company, owning and operating a system of street railways in the city of Atlanta and Fulton county, was preparing and intending to lay its tracks across the line of plaintiff's railroad at Henderson's crossing on the McDonough road; that it had prepared everything for this purpose, and it would be accomplished unless enjoined from so doing. To permit this, it was charged, would render the use of the public crossing a constant menace of danger to the traveling public, and would at the same time do petitioner an irreparable injury in retarding the work and business in which it was engaged; would cause irreparable and perpetual damage to petitioner, resulting in delay to its business, and in accidents to both persons and property while crossing at said point. It was charged that the Atlanta Railway & Power Company was operating its street railway and proposing to cross plaintiff's track by virtue of a certificate of the secretary of state issued on May 16, 1891, which certificate was affirmed by the legislature on August 31, 1891, and denies the power and authority of the defendant, under its charter and under the law by which it is operating, to cross the track at a grade level without its consent; that the purpose to cross the track would be consummated unless it is restrained by the court; and plaintiff prayed for an injunction restraining defendant from in any manner laying its track across the lines of railroad of petitioner at Henderson's crossing, in the county of Fulton. Upon this petition a temporary restraining order was granted by the court. An amendment was added to the peti-

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tion to the effect that the Atlanta Railway & Power Company was chartered by the secretary of state, and not by the legislature, and that the general law of the state regulating the crossing by one railroad of the track of another, as embodied in Civ. Code, § 2219, restricts the right of crossing the track of another railroad to those railroad companies which are chartered by the legislature, and that, therefore, defendant is forbidden by law from crossing the track of petitioner. The right of plaintiff to cross McDonough road constitutes an easement of inestimable value vested in petitioner, and that, as the owner of such easement, it has a right to operate its road on said crossing, free from any hindrance or molestation whatever, save such as is incident to the ordinary use of said road by the public. The petitioner then specifies the damages which would result to plaintiff by increased delay of its business, wear and tear of its machinery, and danger to life and property from the crossing of its road by defendant. Defendant filed an answer to the petition, and denied the facts set up therein as to Henderson's crossing being dangerous and hazardous, as alleged. So far as any danger is concerned, it is caused by plaintiff's trains and traffic crossing over a public highway which existed 35 or 40 years prior to the building of its railroad. Defendant claims a right to cross the track under and by virtue of the provisions of its charter, granted in the first instance by the secretary of state on May 16, 1891, in compliance with the general law for the incorporation of railroads, approved September 27, 1881, and subsequently confirmed by chapter 343, Laws Ga. 1890-91, p. 169, approved August 31, 1891. It denies paragraph 8 of the petition, and says the language quoted in that paragraph from the act therein referred to was not in force on May 16, 1891, when it was first incorporated, nor on August 31, 1891, when its charter was confirmed by the general assembly of Georgia. It denied that its crossing plaintiff's road will have the effect of adding to the dangerous condition of the crossing; alleges it will only have the effect of diverting the travel on said highway from

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private vehicles and persons traveling on foot and horseback to and upon its cars, and, as a matter of fact, the result will be to largely minimize the chances for accidents; and that the building of its street railway on said public road will not create any additional burden upon said railway, and none upon said public road. It has a legal right to cross plaintiff's tracks with its street railway at grade level along and upon said McDonough road at Henderson's crossing. Defendant prays that plaintiff be enjoined and restrained from interfering with it in the construction of its railway on said public road at Henderson's crossing, and that the temporary restraining order granted against the defendant be dissolved. The answer, as amended, also denies the material charges in the amended petition of the plaintiff. A like petition was filed by the Southern Railway Company against the Atlanta Rapid-Transit Company to enjoin it from crossing its road on a street in the city of Atlanta. It appears that this road procured a franchise from the city of Atlanta to construct and operate its line along Decatur street and across the tracks of plaintiff to the city limits. Both these street railways procured like franchises from proper authorities to operate their railroads in Atlanta, and beyond the limits of the city of Atlanta to the city of Decatur. It was conceded that the issues in these two cases were practically the same; the only difference being that the Atlanta Rapid-Transit Company also had in its charter the power to use steam, but the city conferred upon it only the power to use electricity, and it did not propose to use any other motive power in the operation of its road. After hearing the evidence for plaintiff and defendants, the court denied the injunction prayed for in each case, and dissolved the former restraining orders granted. To these judgments plaintiff in error excepts. The grounds of error alleged are as follows: (1) Under the constitution and laws of Georgia private property cannot be taken or damaged unless just compensation has been first paid; and the right of petitioner to cross Henderson's crossing was a valuable

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property right subsisting in it, and was embraced within the term "property" as used in the constitution; and the construction of the street-railroad tracks across the tracks of petitioner was a taking and damaging of petitioner's said property right. (2) Although it was thus preparing and threatening to take and damage petitioner's property, it had neither paid nor offered to pay, nor had it taken any steps to ascertain, the damages that petitioner would suffer by such crossing of its tracks. (3) The acts of the defendant of building its tracks across the tracks of petitioner without first paying just compensation for damages inflicted was an unlawful trespass upon petitioner's rights, and without authority of law. (4) For the acts complained of petitioner was remediless at law, and could receive adequate relief only in a court of equity. (5) The evidence and pleadings show that the defendant, the Atlanta Railway & Power Company, had been incorporated by act of the secretary of state, and under the law of Georgia only those railroad companies which were chartered by the legislature have the right to cross the tracks of another railroad company at grade. The same questions were raised in the case against the transit company, except the one last mentioned; and as to this company the point as to its charter power to use steam was insisted upon.

1. One point made by the petition in this case against the Atlanta Railway & Power Company is that this company, in the light of the history of its charter, has never been incorporated by the legislature of this state but was incorporated by certificate from the secretary of state, and that, therefore, under Civ. Code, § 2219, as the privilege of one railroad company crossing another is only given to such companies as are chartered by the legislature of this state, this defendant company has no right at all to cross plaintiff's road. We do not think, however, that a street railroad constructed on a public highway, with consent of the proper authorities having jurisdiction over such high-

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ways, needs any benefit from the provisions of section 2219. Being a public highway, it has, independently of that section, a right to cross the tracks of a railroad crossing the public road, just as any other vehicle or mode of transportation on such public road might cross the same, provided it duly obtains a license from the proper authority in charge of the street or road it proposes to use. But, even if the provisions of section 2219 are applicable to the crossing by a street railway of any other railroad, we are quite confident that the phrase, "heretofore or hereafter chartered by the legislature of this state," embraces a street-railroad company whose charter, though granted by the secretary of state, has been confirmed or made valid by an act of the general assembly. While this defendant company originally obtained its charter from the secretary of state, the same has since been confirmed by an act of the legislature of August 31, 1891 (Acts 1890-91, p. 169). It is therein declared: "That all charters heretofore granted by the secretary of state to street and suburban railroad companies are hereby confirmed and declared to have had full effect from their dates." See *Almand v. Railway Co.*, 108 Ga. 423, 34 S. E. 6 *et seq.*, where the charter powers of this defendant company were thoroughly discussed by this court, and where the act of August 31, 1891, above cited, was recognized by the court as confirming by direct act of the legislature all charters theretofore granted by the secretary of state.

2. The main contention in behalf of plaintiff in error in these cases is that the defendants have no right to cross its track even on these public highways without first making compensation for the damages which would result therefrom. It is obliged to be conceded ^{Same-Additional Servitudes.} that no such damages can be claimed unless the acts of the defendants complained of would amount to an invasion of some property right of the plaintiff resulting in its injury and damage. It appears from the record that many years before plaintiff's line of railway was constructed over the highways in question they had been in use for travel

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by the public. The only right the railway company acquired was necessarily simply an easement to cross these highways with its lines of railway, and to transport across the same its freight and passengers. It acquired no fee-simple title whatever to any portion of the road, but necessarily received its easement subject to the right of the public to continue to freely use the highway for travel. This, of course, does not imply that the government authorities having control of these highways cannot, as the public exigencies and convenience may require,—for instance, by an increase of population in cities or towns,—add to the facilities for travel over such roads. These authorities would have as much right to grant licenses and privileges to others to use vehicles and conveyances propelled by different kinds of power for the purpose of accommodating the public, and for the public benefit, as the plaintiff company would have to increase the number of cars and engines on its line of railway, and the frequency of trips across these highways, whenever this would be demanded by the increase in its business. If, for instance, in this case, it should happen that the present business of the plaintiff company requires twice as many cars and engines now as it did soon after its first construction, can it be pretended that either the county or the municipal authorities would have a right to exact of it any pay for such further privileges before they could be exercised? Now, if these electric car companies impose no new burden or servitude upon the public streets or highways by constructing and operating thereon street railways for the transportation of passengers, the cars of which are propelled by electric power, it will necessarily follow that passing over a railway track crossing a public highway does not make them liable for any damages. As to whether or not a company engaged in the operation of electric cars upon the streets of a city or the public roads of a country would thereby impose a new servitude upon such roads, and would, therefore, be liable to damages which others might sustain in

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consequence thereof, seems to be an open question in this court. In the case of *Floyd Co. v. Rome St. R. Co.*, 77 Ga. 614, 3 S. E. 3, it was decided that a railroad operated by horses on a public highway is not an appropriation of that highway to a different use. It will be seen from the facts in that case that the county of Floyd had constructed a bridge which spans a river at the foot of Howard street, in Rome, Ga., and placed it under the control and management of the authorities of the city of Rome. The Rome Street-Railroad Company was empowered by its charter to lay out, construct, equip, use, and employ street railroads in the city of Rome and Floyd county, and was given power to cross the bridge in question. That bridge was afterwards washed away. The county constructed a new one, and then sought to enjoin the street-railroad company from running its track over the bridge without paying compensation therefor. The injunction applied for was refused, which was affirmed by this court. On page 618, 77 Ga., and page 4, 3 S. E., HALL, J., delivering the opinion, said: "The laying of railroad tracks in a public highway or street does not subject it to a new use or servitude. Its use is not confined to the precise mode or kind of use which was in view at the time of the taking, but may extend to other modes which were then unpracticed and unknown." It was further announced: "A railroad operated by horses on a public highway is not an appropriation of that highway to a different use;" and it was recognized that in some states the decisions go so far as to hold that the appropriation of a highway to the use of a railroad propelled by steam would not change the use to which it was originally dedicated, while in others the contrary was held as to steam railroads. It is true this decision had reference to street railroads operated only by horse power; but we cannot conceive how, if the cars are operated by electric power, they can produce any more burden or servitude than those operated by horse power. The latter certainly, with the horse and car combined, would take up more

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space on the street than the ordinary electric car; and the facilities for stopping and avoiding accidents are certainly not any greater than they would be when electric power is used. This question, however, has been passed upon by courts of last resort in other states, and we have failed to find a single case where it has ever been held that a street-car company, it matters not by what power its cars are propelled, did not have a right, after receiving a grant from proper municipal or government authorities, to use streets, and to pass over the lines of other railways that may cross such streets, without being liable in damages to such other railway companies. There is, however, abundant authority to sustain the contrary view. In *Chicago & C. Terminal Ry. Co. v. Whiting, H. & E. C. St. Ry. Co.*, 139 Ind. 297, 38 N. E. 604, 26 L. R. A. 337, it was held: "Since it is the settled law of this state that a street railway is not an additional burden to that of the easement which the general public has in the street, and that the street-railway company's right to use the street is founded on that easement, it must be held that the right of a street railway to cross over the tracks of a steam railway laid on such street is subject to no conditions other than those to which the general public is subject in traveling over such streets. Hence it is not error to enjoin a steam-railway company from interfering with a street-railway company where the latter is proceeding to construct a proper crossing at its own expense." In that case it appeared that the steam-railway company sought to interfere with a street-railway company, which was operated by electricity, and to prevent it from proceeding to construct a crossing over the railway of the former. The street-railway company applied for an injunction and the grant of the same was sustained by the supreme court of Indiana. It was further decided in that case that the same principle applies where the crossing is in a public highway not a street. See this same case reported in 151 Ind. 577, 46 N. E. 999, in which the principle above announced was adhered to and reaffirmed. In *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*,

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156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485, it was held: "The fact that the tracks of a railroad company are laid across city streets, and its cars permitted to pass over them, gives the company no exclusive use of the crossing, but only use to be enjoyed with the public. Erections upon a public street impose no additional servitude where they aid and facilitate its use for the purposes of travel and transportation. Permission to a street-railway company to lay its tracks in a public street is not a grant of an additional easement in the soil of the street, such road being merely a modification of the existing public use, adding thereto an additional mode of conveyance, and inflicting no damage upon the owner of the fee." It appears in that case that the street-railway company intended to lay its tracks and operate its cars by animal power only, although it had the right to use cable, electric, or other motive power. In *Elizabethtown, L. & B. S. R. Co. v. Ashland & C. St. Ry. Co.*, 96 Ky. 347, 26 S. W. 181, it was held: "When a railroad company has obtained the right to pass over a turnpike by the permission of those controlling the road, the right thus acquired is not exclusive of the rights of the public, or of such uses and purposes as those for which public highways and streets are established, among which uses are the establishment and operation of street railways. Therefore the railroad company has no such property rights in the crossing as entitle it to compensation from a street-railway company crossing its track at that point, the progress of the cars of the former not being unreasonably impeded or interfered with." It seems from that case that the charter of the street railway empowered it to use steam, horse, or other propelling power for the transportation of its passengers. Counsel for plaintiff in error seek to distinguish that case from the one at bar by reason of general and special legislation, and special grants to the street-railway company; but we fail to see from the record and report of that case that the street railway had any more special grant of power to use the streets and highways where it had its road in operation than the defendants in this

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case have under the law and the licenses granted them to use the street and highway in question. In *Railroad Co. v. Steel*, 47 Neb. 741, 66 N. W. 830, it was held: "A railroad company which has by ordinance acquired a permanent easement in the streets of a city is not entitled to compensation from a street-railway company as a condition to the crossing of its tracks by the latter under a grant of power from the city." See the able opinion of POST, C. J., on page 746, 47 Neb., and page 831, 66 N. W., *et seq.*, and authorities he cites. The following is the conclusion of his opinion: "The doctrine of the cases cited, and which to us appears altogether reasonable and sound, is that a railroad company acquires no exclusive use of streets crossed by its tracks with the consent of the city or other municipal body, but must enjoy the right so conferred in common with the general public; that it is presumed to have contemplated the adoption of such improved means of travel as the exigencies of the case require in order to best subserve the public interests and necessities; and that any mere inconvenience suffered by it on account of the crossing of its lines by the tracks of street railways by permission of the proper authorities is *damnum absque injuria*." See the same principle enunciated in *Texas & P. Ry. Co. v. Rosedale St. Ry. Co.*, 64 Tex. 80, where it was held: "Streets are acquired, established, and maintained for the accommodation and convenience of the inhabitants and the general public, and may be used for the convenience of the public by the ordinary modes of conveyance operated upon such streets, the chief of which, in this case, was the street railway. Railroad companies have not the exclusive right to a public crossing, but are restricted by public convenience and necessity." In the case of *Kansas City, St. J. & C. B. R. Co. v. St. Joseph Terminal R. Co.*, 97 Mo. 457, 10 S. W. 826, 3 L. R. A. 240, it appears that a railroad company obtained from the city the right to keep and maintain its tracks and switches upon certain land, and to construct such other tracks, switches, and turnouts upon the land and across a street, when opened, as it deemed necessary for the

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transaction of its business. It was there held that such reservation was not the grant of an exclusive privilege, but only equivalent to the usual permission to occupy the street with its tracks, and plaintiff was not entitled to compensation from the defendant railroad company laying its track along the street by permission of the city, and across plaintiff's track therein; nor can it enjoin defendant from so laying its track, when authorized by the city to do so. See, also, *Du Bois Traction Pass. Ry. Co. v. Buffalo R. & P. Ry. Co.*, 149 Pa. St. 1, 24 Atl. 179. Several of the states whose decisions are directly in point, and which are cited above, have provisions in their constitutions similar to ours, to the effect that private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid. The states referred to are Nebraska, Illinois, Missouri, Kentucky, and Texas. Authorities might be multiplied to sustain the principle herein announced, but we deem it entirely unnecessary.

It is contended, however, that one of these defendants in error, to wit, the Atlanta Rapid-Transit Company, has in its charter authority to use steam as a propelling power for its cars, and that the weight of authority is that steam railways constitute a burden and servitude upon a public street. A complete answer to this is that by the license or franchise granted by the city of Atlanta to this company it is authorized only to use electric power, and there is nothing in the record to indicate that it ever intends to use anything else. We do not mean to say that its use of steam instead of electricity as a propelling power would necessarily deprive it of the right to cross this track at the point in question without being liable in damages to the plaintiff railroad company. Whether or not a street or suburban railway constitutes a burden upon streets or highways in a city or country does not depend so much upon the motive powers used in propelling the cars as it does upon the character and nature of business it transacts. For instance, what is known as a

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"commercial railway," which carries not only passengers, but quantities of freight, from one portion of the state to the other, and even from one state to another, in traversing public highways of the country or streets of a city would necessarily constitute a greater burden and servitude upon such highways or streets than an ordinary car of a street or suburban railway, whether propelled by steam, cable, electricity, or otherwise, which has for its purpose simply the transportation of passengers from one point to the other on the streets of a city, or to adjacent places in the contiguous country. A marked difference between the two systems is that the former often carries long trains of passengers and freight cars over its line, and is not intended at all for the accommodation of the public desiring to go from one portion of the city to the other, while the latter ordinarily uses one car, and facilitates the transportation of passengers desiring only to go short distances between different points in the city. Hence it is that the decision of this court in *Georgia Midland & G. R. Co. v. Columbus Southern Ry. Co.*, 89 Ga. 205, 15 S. E. 305, and which was relied on by counsel for plaintiff in error, has no application whatever to the facts in the present case. It was there decided in the headnote: "Without first making compensation for the damages which will result therefrom, one railway company cannot lay and use its track across the track of another railway company located in a public street of a city." It will be seen from the facts in that case that it was a contest between two commercial railway companies, and the city of Columbus constituted a terminus of each of these lines of railway. It was complained in the case that the petitioner constructed its depot, roundhouses, etc., on the depot grounds. The lands for terminals of defendant, with its depot site, side tracks, etc., lay east of petitioner's property, and that it was entirely unnecessary for it, in order to make its proper connections, to construct a side track just north of petitioner's depot grounds at a point where is located the travel and entrance to petitioner's grounds, thus unneces-

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sarily increasing damage, delay, hindrance, inconvenience, and risk of accidents to the plaintiff at a point where its traffic of every sort passes. It will thus be seen that there is no analogy whatever between that case and the present one, where the defendant roads, under grant of authority from proper sources, are running their lines along the streets and public highways for the benefit of the public itself. Neither has the case of *Campbell v. Railroad Co.*, 82 Ga. 320, 9 S.E. 1078, any application whatever to the case we are now considering. It was there decided: "The construction and operation of a horse railway in the public streets of a city by authority of the legislature and the consent of the city government, whether it be a new burden upon the streets or not, does not entitle a private individual to compensation therefor, unless the construction or operation of such railway works special damage to his property. If noise, smoke, dust, cinders, or things of that sort be shown to have damaged the property, they should be considered in arriving at the amount of the recovery; but, if they amount merely to inconvenience or discomfort to its occupants, they are not an element of damages, and should not be so considered." It appears in that case that the railroad company had permission from the legislature and the city council to lay its track in the streets where it pleased. In this particular place it elected to lay its track near the sidewalk of plaintiff's residence, and it was contended that the unceasing passage of cars so near the entire front of petitioner's property would effectually cut off all safe entrance to or exit from the front of said property to any kind of vehicle. The marked difference between that case and the present one is that the plaintiff there owned the absolute title to the abutting lot. We think the principle therein decided was correct. Under the provisions of the constitution which requires compensation to be paid not only for property taken in the exercise of eminent domain, but also for property damaged thereby, this necessarily implies that for a direct invasion of any legal right of property pertaining to its ownership and enjoyment which results in

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material damage to the property the owner must first be compensated, whether it has been seized or not. One of the rights pertaining to the ownership of a home, for instance, is free and comfortable ingress and egress thereto; and this right cannot be interfered with, even for the public good, to the extent of causing material damage to the market value of the property itself, without compensation being paid in advance to the owner.

4, 5. But in the present case we fail to see that the defendants have invaded, or were seeking to invade, any legal right of plaintiff. As above indicated, when the plaintiff was permitted to construct its track across an existing street or public road, it did so subject to the condition that it must submit to the increased inconvenience which might result from the growth and development of the city or country, and the consequent increase of travel in the usual methods along such street or road. It acquired only an easement; that is, a privilege of crossing this street and road in the transportation of its freight and passengers. It may be that the crossing of defendant's tracks over this street and highway will cause inconvenience to the plaintiff, but, as we have above demonstrated, this use thereof by the defendants, instead of constituting any burden or servitude upon them, is intended for the convenience and benefit of the traveling public on these streets. The question as to whether or not their construction was necessary and important in order to accomplish such a purpose has been passed upon by tribunals constituted by law to decide such issues. There is nothing in the record to show any abuse whatever of the exercise of that power. When plaintiff, therefore, obtained its license to cross these highways, it necessarily took the same subject to any increased inconvenience which might arise by reason of the demands or wants of the public for greater facilities for traveling. *Cleveland v. City Council*, 102 Ga. 233, 29 S. E. 584, 43 L. R. A. 638. We are at a loss, therefore, to see how any legal right of property of the plaintiff will be invaded, or in any

Same—Right to
Use Street—
Implied Con-
ditions.

Notes

wise affected, by the exercise of the rights and franchises which the street-railway companies are attempting to use in the present instance. It follows from the above that no legal right of plaintiff has been encroached upon, and none of its property has either been taken or threatened to be taken or damaged in contemplation of law. The companies, therefore, owning and operating street railways of the character above indicated, may, under the permission of proper municipal or county authorities, construct their lines across the track of the plaintiff, and use the same, without instituting condemnation proceedings, or being required to pay damages. The court did not err in denying the injunctions prayed for or in dissolving the restraining orders which had been previously granted. Judgment in each case affirmed. All the justices concurring.

Same—Right to
Cross Tracks of
Steam-Railroad
Company—
Eminent Domain.

NOTES.

Street Railways—Additional Servitudes.—See article by J. Newton Fiero, Esq., in 1 Am. & Eng. R. Cas., N. S.

Eminent Domain—Right of Street Railway to Cross Railroad.—Such special damage as will justify the interference of a court of equity is not suffered by a steam-railway company which has merely the right to operate its road across the highway at grade, through the establishment in the highway of a street railway, the motive power of which is electricity, supplied by means of wires elevated a sufficient height to admit the free passage of the cars of the steam road thereunder. *West Jersey R. Co. v. Camden G. & W. R. Co.*, 52 N. J. Eq. 31; *Morris & E. R. Co. v. Newark Pass. R. Co.*, 51 N. J. Eq. 379; *Old Colony R. Co. v. Rockland & A. St. R. Co.*, 161 Mass. 416; *General Electric Ry. Co. v. Chicago & W. I. R. Co.*, 184 Ill. 588; *Scranton & P. Traction Co. v. Delaware & H. Canal Co. (Pa.)*, 1 Super. Ct. 409; *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255; *Pittsburg, C. & St. L. R. Co. v. West Chicago St. R. Co.*, 156 Ill. 385.

An injunction will not lie at the instance of such steam railroad to restrain such crossing nor will compensation be granted unless some special and peculiar damage to its property is shown. *New York, etc., R. Co. v. Fair Haven, etc., R. Co.*, 70 Conn. 610.

Ownership in fee of its roadbed gives a steam-railroad company

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JACKSON

v.

ST. LOUIS S. W. RY. CO.

(Supreme Court of Louisiana, Feb. 5, 1900.)

Injury to Trespasser—Forcible Ejection from Train—Liability of Railroad.*—Where a boy of 14, even though he be trespassing, is forcibly ejected from a moving railroad train by a person for whose actions the company is responsible, and thereby loses an arm, the company will be held liable in damages.

Excessive Verdict.—Verdict for \$4,000 sustained.

(Syllabus by the Court.)

APPEAL by defendants from parish of Caddo judicial district court. *Affirmed.*

Alexander & Wilkinson, George Wesley Jack, and S. H. West, for appellant.

A. D. Land, Jr., and Thigpen & Foster, for appellee.

MONROE, J. Plaintiff, as the dative tutor of the minor, Lewis Craig, claims that said minor was summarily and unlawfully ejected by a servant of defendant from its train while the same was in motion, with the result that the car wheels passed over his left arm and so mangled it that amputation was necessary. He alleges that the minor was guilty of no negligence, and that he has sustained damages to the amount of \$10,000, for which he prays judgment. Defendant denies fault on its part, and alleges that any injuries which the minor may have sustained resulted from his own negligence while trespassing upon

* See *St. Louis & S. F. R. Co. v. Kilpatrick* (Ark.), 17 Am. & Eng. R. Cas., N. S., 212 *Mugford v. Boston & M. R. R.* (Mass.), 16 *Id.* 684; *Johnson v. Chicago, St. P., M. & O. Ry. Co.* (C. C.), 15 *Id.* 683 and *foot-note*.

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defendant's property. Taking the pleadings and evidence together, the case presented is as follows:

Not long before noon, July 11, 1899, one of the defendant's trains, consisting of an engine, baggage car, coach for colored people, coach for white people, and sleeper, reached Shreveport, and pulled into the Union Depot. The passengers and the baggage were soon discharged, and the train then backed in the direction of certain freight yards, in order to be put in readiness to go out, according to schedule, in the afternoon. The defendant company is called the "Cotton Belt," but, so far as the testimony goes, it appears that it went into Shreveport over the bridge of the Vicksburg, Shreveport & Pacific Railroad Company, used the tracks of said company in reaching the depot and in backing out, and that the freight yards into which it backed, and where it was to remain and be overhauled preparatory to its departure in the afternoon, were the yards of the same company, from which it would seem that the two roads are conducted under one management, or (and beyond any question) that they are working under an arrangement whereby the bridge, the tracks to the depot, and from the depot to the freight yards, as also the depot itself and the freight yards, are used in common. Just before the train in question backed out of the depot, the boy (about 14 years old) in whose behalf this suit was brought got aboard. He states that his purpose was to mail a letter, but that, not knowing where to mail it, he got off when the train started, and then, when the train was in motion, seeing the mail box or opening for letters in the side of the baggage car, he got on again, intending to ride to a street crossing at which a stop was usually made, and avail himself of the opportunity to accomplish his mission. The theory of the defendant is that his purpose was to steal a ride. There is some evidence corroborating the statement of the boy, and some corroborating the defendant's theory. Premitting this question, it will be understood that in backing the position of the cars was reversed, and that as the train was moved they were in the following order, from front to rear,

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to wit: Sleeper, white coach, colored coach, baggage car, and engine. So that accommodating this opinion to the testimony of the witnesses who spoke with reference to the manner in which the train was made up, rather than with reference to the direction in which it was going, the expressions "rear platform" and "front platform" are to be taken in the opposite sense to that in which they would ordinarily be understood, with the engine in front. Bearing this in mind, the boy was on the lower step either of the front platform of the sleeper or of the rear platform of the white coach; and while the train was moving at the rate of six or seven miles an hour he either jumped, fell, or was forcibly ejected, in such a way that his left arm was so mangled under the wheels that amputation at the shoulder was necessary and was performed almost immediately. This being the case, it is immaterial what may have been his reason for getting on the train. If he voluntarily jumped, or through fault or misfortune of his own fell off, he is not entitled to recover. Upon the other hand, if he was forcibly ejected, by any one for whom the defendant is responsible, he is entitled to recover, no matter why he got on the train, since there is no law authorizing the taking off of a boy's arm at the shoulder as a penalty for trespassing on railroad or any other property. We have, therefore, to consider the two questions of fact: (1) Did the boy jump or fall off, or was he forcibly ejected? (2) If forcibly ejected, was it by any one for whom the defendant is responsible? There is more or less of conflict in the evidence, but the truth lurks in the midst of the conflict, and, though somewhat obscured, is not beyond the reach of deliberate and impartial investigation. There are some white witnesses and some colored ones, some who are railroad men and some who are not; and, without regard to these distinctions, there are some, and this includes the majority, who have stated the facts as they understood them, and to the best of their ability, and others, being a small minority, whose statements are irreconcilable with knowledge in their possession and with their want of knowledge.

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There is no question but that the boy was standing on the lower step of either the sleeper or the white coach, facing outwards, and that while in this position his feet, either voluntarily or involuntarily, went out from under him, and that after hanging and dragging a little he fell under the car and received the injury of which he complains. His statement is as follows: "When we got in front of Ed. Walker's saloon, a white fellow came to the door and said, 'Get off.' I looked around at him and did not pay any attention to him, and I kinder looked again. Q. And he hallooed at you? A. Yes, sir; he said, 'Get off here,' and I turned around towards the depot, and then he kicked me; and when he kicked my feet from under me I held hold of that little thing by the steps that you pull up with. I held hold of that with my left hand, but the train jerked me and I had to turn loose, and it rolled over my arm. I was standing on the steps when he kicked." Elmore Jackson, Lewis Stephens, and Henry Toney were standing in front of the saloon to which the boy refers. Jackson and Stephens testify positively that they saw the man, who is identified as Smith, kick the boy off, and that there was no one else on the platform at the time. Toney testifies that the man rushed and hallooed at him, and made him jump off, and that he did not see him kick the boy, but that he cannot swear that he did not, and thought he was near enough to have kicked him. Wood testifies that he was loading his express wagon, and heard exclamations of the bystanders, "The man with the white shirt on kicked the boy off." Jackson also testifies that he went to the boy immediately, put him in a hack, and sent him to his mother, and that the boy said, "That man kicked me off." The story which Smith tells is that he has been for the past ten years in the employ of the Vicksburg, Shreveport & Pacific Railroad and the defendant companies, but that at the moment of the occurrence he was unemployed. As we understand him, he had just previously been in the employ of the Vicksburg, Shreveport & Pacific Company and

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re-entered that service immediately afterwards, so that the time during which he was not so employed was measured by that of the occurrence. He says that he got on the train at the bridge, as it was coming in, because he wanted to see the conductor and ask him how he had been getting on, and that he saw the boy catch on at that point; that, in backing out from the depot, he was standing on the rear platform of the white coach, riding around for pleasure, while the boy was on the adjacent front platform of the sleeper, and that he neither spoke nor did anything to him, but that the boy jumped off; that, considering the speed of the train at the time, any one used to getting off trains would not have fallen; and that he remained on the platform after the boy was caught in the wheel, made no attempt to pull him out, and did not know until afterwards that he was hurt. Being asked, "How soon did you leave the train after that accident?" he replied, "I think, about two weeks." At the end of which time it appears that he went to visit his father, in Mississippi, and remained there, until he returned to Shreveport in order to give his testimony. He further testifies that he had not been in the employ of the Cotton Belt since 1897, and has chased no boys off its trains, and would not have done so under any circumstances, though he also says that he was employed in the yard, and that all the men there, from car inspector down, have orders to keep trespassers and vagrant boys off the trains. He further says that he had seen the boy, in whose behalf the suit is brought, jumping on and off the trains every day.

There are two witnesses who undertake to testify positively that Smith did not kick the boy,—Shanklin and Hutton. Shanklin was at that time in the employ of the Vicksburg, Shreveport & Pacific Company, and was going towards the depot, from which the train was coming, on another track, and on the side upon which the boy came off. He says, "I was a car length below, and had a full view of the rear end of the car, when the boy fell;" and, from his further testimony, he places himself somewhere near the end of the

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sleeper, and from $2\frac{1}{2}$ to 5 feet from its side. He swears most positively and emphatically that there was no one but the boy on the rear platform of the white coach, that the boy was on the steps of that platform, and that he fell off, and was not kicked off. It is shown to our satisfaction that within a fortnight after the occurrence this witness stated that he was not in a position to see whether the boy was kicked off or not, and it is evident that there is an irreconcilable conflict between his testimony and that of Smith, who swears that he was standing on the platform upon which the witness swears that there was no one standing. The other witness, Hutton, claims to have been standing about half-way in the rear door of the white coach, with one foot on the platform, and near Smith, who was outside on the platform. He says that the boy was on the steps of the sleeping-car platform, and beyond Smith's reach, and that Smith neither spoke to him nor kicked him. He also says that the boys are great nuisances and worry the railroad company's employees a great deal, and that he now and then tells them that "they ought to be doing something else than catching passenger trains." Two other witnesses, Woodward and Russell, testify that they did not see Smith kick the boy, though they saw the exit of the latter, and saw him hang by the hands, drag, and fall. This testimony is unimportant, except in so far as it corroborates the boy's story. Woodward was seated in the colored coach, and Russell was standing on the lower steps of the front platform of the white coach, and neither could see Smith, who was on the rear platform of the white coach. Their statement that the boy appeared to jump or step off throws no light on the question at issue, because any one so situated, and driven by force from the rear, would involuntarily make some effort. Woodward says that he could have seen anybody kick him. This is manifestly untrue. Russell, who was in a better position than Woodward, says he could have seen it if the boy had been kicked

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"hard." He, no doubt, means by that, that if Smith, in kicking the boy, had brought his own person within range of his (Russell's) view (*i. e.* beyond the line of the car's side), the witness could have seen it. But that is not to the point. Several other railroad employees were examined, and they agreed that the practice of jumping on and off the trains by colored boys was a source of great annoyance, and that their instructions were to keep the boys off. One or two of them undertake to identify Craig as one of the offenders. It also appears that there is an ordinance of the city under which the offence can be dealt with. The chief of police testifies that in July, 1899, when the affair occurred, Smith was a special officer, appointed at the request of the railroad companies and paid by them, and that he was so appointed upon the representation that they needed such a person as watchman at the bridge, because of disturbances on trains, and because of the annoyance to which they were subjected by boys jumping on and off their trains. Jones, train inspector for the Vicksburg, Shreveport & Pacific Company, testifies that Smith had been employed about the yards for several years, and was so employed in the summer of 1899, and that he had seen him chase boys off the trains. And Richler, Walker, and Fants also testify to having seen Smith so engaged; Walker mentioning the name of a boy who was arrested by Smith in August, 1898, and fined five dollars. When we add to this testimony the eloquent silence of the defendant upon the subject of Smith's employment, further comment becomes unnecessary. If he was not employed by it, some respectable and responsible officer would have so testified, as its learned counsel fully appreciated the importance of the question.

We concur in the conclusion reached by the jury before which the case was tried, and by the judge *a quo*, who made the verdict the judgment of the court, that the case is with the plaintiff, and that it has been proven that the boy in whose behalf the suit was brought has lost his arm by reason

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of his having been forcibly and unlawfully ejected from a moving train by a person for whose actions the defendant is liable. Cooley, Torts, §§ 532, 538; Burrows, Neg. 155; Steamboat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049; Hoffman v. Railroad Co., 87 N. Y. 25; Higgins v. Railroad Co., 46 N. Y. 23; Coleman v. Railroad Co., 106 Mass. 160; Johnson v. Railroad Co., 58 Iowa 348, 12 N. W. 329; Hart. v. Railroad Co., 1 Rob. 178.

The amount of damages awarded was \$4,000, and defendant's counsel argues that, considering the position, earning capacity, etc., of the person injured, this is excessive. The boy is poor, black, illegitimate, and ignorant, and when injured was receiving 75 cents a week for working about a negro barber shop, to which were added his earnings (probably a few dollars a week) as a bootblack. It seems to us that, being thus about as badly situated as a boy of 14 who is not an invalid or a criminal can be, he was particularly in need of the arm of which he has been deprived; for that and the other arm were about all that he had to depend upon to help him through in the long struggle which lies before him, and which is hard enough even for those who are better situated and have both arms and hands, and that the amount allowed is not excessive. Ketchum v. Railroad Co., 38 La. Ann. 777; Barnes v. Railway Co., 47 La. Ann. 1218, 17 South. 782; Lampkins v. Railroad Co., 42 La. Ann. 997, 8 South. 530. The judgment appealed from is therefore affirmed.

Excessive
Verdict.

On Application for Rehearing.
(June 28, 1900.)

The counsel for the defendant, in their brief filed in support of the application for rehearing, say: "Craig says his feet were kicked from under him, yet, search the record in vain, and not another witness says as much. If he was false in these particulars, it was an easy matter for him to be false in all." With no particular effort, we have found the following testimony upon the subject mentioned, beginning with that

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of Craig, the plaintiff, to whom the counsel refer, to-wit: Lewis Craig: "He said, 'Get off here,' and I turned around towards the depot, and then he kicked me; and when he kicked my feet from under me I held hold of that little thing by the steps that you pull up by. I held hold of that with my left hand, but the train jerked me and I had to turn loose, and it rolled over my arm. I was standing on the steps when he kicked me." Elmore Jackson: "Q. Did you see Tony Smith kick him? A. Yes, sir; I saw him kick him. Q. Did you see the boy fall off? A. When he kicked him, he disappeared to my eyes. I was on the ground, and couldn't see across. Q. What side was he on? A. Next to the depot, and I was on the side next to the saloon. After he fell I could not see him until the train passed, and then I saw him get up, with his arm folded like this. Q. Did you recognize Mr. Tony Smith? A. Yes. Q. How long have you known him? A. I was raised where he was. I lived there for a number of years after he moved there. Q. There is no doubt about his actually being the man who kicked Lewis Craig off? A. He was the man. I saw him. * * * Q. Did Lewis make any statement at that time as to how it happened? A. Yes, sir; he said, "That man kicked me off." Lewis Stephens: "Q. Where was the boy at the time you saw him? A. He was standing on the coach steps, and that man, Tony Smith, kicked him off the train. * * * Q. You saw this man kick the boy off the train? A. Yes, sir, I saw him kick him off the train. Q. There is no doubt about it? You saw him kick him? A. Yes, sir; I saw him kick him off the train. Q. You saw the boy fall? A. Yes, sir. Q. And when you next saw him his arm was mashed? A. Yes, sir." Cross-examined: "Q. How did the boy fall? Did the man kick him clear loose, or did the boy hang by the rail a little while? A. When the man kicked him, he fell and hung a little while. He hung onto it a little while." Robert Wood: "Q. What is your employment? A. I work for the express company. * * * Q. Do you remember anything about the date on which Lewis Craig is said to have been injured at the Union Depot?

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A. I do not remember the date. Q. Do you remember the fact? Were you at the depot at the time? A. Yes. Q. What were you doing? A. Loading the express wagon. Q. Did you see the occurrence? A. No, sir; I did not see it at the time it happened. Q. State whether or not, about that time, you heard any voices or cries or exclamations in regard to that accident. A. I did. Q. What were they? A. I heard them say, 'The man with the white shirt on kicked the boy off.' Q. Was that right at the time of the accident? A. It was about two or three minutes before the boy got in front of the wagon. Q. Did you see the boy? A. Yes, sir. Q. What was his condition? A. George was leading him, and his other arm was hanging. I stopped work to look at him. * * * Q. Did you see Tony Smith there that day? A. Yes, sir. Q. How long have you known him? A. Since before he was grown good. I knew his father well. He has been around the bridge here for five or six years."

The learned counsel refer to this testimony, and say that Jackson does not testify that Craig was kicked off the train, but that, having been kicked, he disappeared from the eyes of Jackson, who was upon the other side, and could not see across. It will be observed, however, that Jackson also testifies that when the train passed he saw Craig "get up, with his arm folded like this" (probably demonstrating the manner in which the boy held his crushed arm). As to Stevens, the counsel say that "his evidence is so emphatic and manifestly exaggerated that in every line his bias is shown." Nevertheless, he is another witness who "says as much" as Craig, and whether he is exaggerating or is biased is a good deal a matter of opinion. The counsel for the plaintiff seem to think that he is not, and this court is also of that belief. Counsel for defendant state that Henry Toney, a witness for the plaintiff, "says positively that the boy jumped off, and was not kicked or pushed off." That was evidently the impression which Toney received from his point of observation, and he so testified when first on the stand, but upon

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being recalled he testified as follows: Q. You stated in your direct examination that you saw a man on the platform, and saw the boy jump off. Did you mean the jury— (Objected to by counsel for defendant.) Q. Can you swear that Tony Smith did not kick that boy off that train? A. No, sir; I cannot. Q. You say that you did not see him kick him? A. No, sir; I did not see him kick him. Q. Can you swear positively that he did not kick him? A. No; I cannot. Q. by juror. Did not you swear that you saw him jump off? A. I said that the man made him jump off. Q. How far was the man from the boy when the boy jumped off? A. He was opposite the coach door. Q. On the inside of the coach or on the outside of the coach? A. It was outside of the coach. Q. Could he have kicked the boy? A. Yes." The learned counsel, referring to the claim that Smith was acting for the defendant, as their employee, or under circumstances which made the defendant liable for his conduct, say, "On the next proposition the evidence of plaintiff does not make even a *prima facie* showing." The following is the evidence, and all the evidence in the record, except that of Smith, upon the subject of that individual's employment at or about the time of the accident. C. E. Richler: "Q. Are you acquainted with Tony Smith? A. Yes, sir. Q. Do you know whether or not he is employed by the Cotton Belt road? A. I cannot say positively. Q. What do you mean? A. I cannot say positively, because I do not know whether he is employed by them or not. Q. Did you see him during the month of July, last summer, working for the Cotton Belt? A. I cannot say that positively. Q. What did you see him doing? A. I saw him on the cars, the same as other parties,—chasing the boys off the cars. Q. Can you say whether or not he was employed by the company? A. I do not know. Q. You saw him keeping boys off the train? A. I saw him running the boys. Q. In July last? A. Yes. * * * Q. Did he seem to be working pretty energetically at that,—chasing the boys away? A. Yes, sir. Q. At the time there were two trains a day? A. Yes, sir. Q. He seemed to be working vigorously

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at chasing the boys? A. He had to be lightfooted to catch them, and he caught very few. * * * Q. Did you ever see Tony Smith working on the Cotton Belt train immediately after the injury to Lewis Craig? A. Yes, sir; yes, sir; I saw him one, two, or three days after that." Cross-examination: "Q. You saw this man Tony Smith on the cars, passing back and forth, but you do not know whether he was on the pay roll of the company or employed by the company? A. No, sir; I do not know whether he was or not. I saw him on the cars, chasing the boys. Q. You have seen other men on the other train, keeping them off, too? A. I have seen Trout. He had them getting off the top sometimes, as well as off the platform." C. E. Jones: "Q. Are you acquainted with Tony Smith? A. Yes, sir. Q. Have you ever seen him chase boys off the Cotton Belt train? A. Yes, sir; I have seen him chase boys off the Cotton Belt train, and I have seen him chase them off of the V., S. & P. train, also. Q. Do you know whether he is employed by the Cotton Belt? A. No, sir; I do not. Q. Do you know whether he was employed by the Cotton Belt last summer? A. I do not remember the date, but for quite a while he was employed there. He has been employed mostly in the yard. I do not know what train it was, exactly, but it was some time during the present summer. He was employed in the yard, mostly, for three or four years. Q. What were the general orders to the men working in the yards, in reference to these boys jumping on and off the trains? A. We have all got instructions to keep them off there, if possible. Q. What position do you hold? A. Train inspector of the V., S. & P. Railroad." Cross-examined: "Q. Is it a matter of great annoyance and trouble to the V., S. & Pacific and the Cotton Belt people to keep these little boys off the train? A. Yes, sir." Ed. Walker: "Q. Did you ever see Tony Smith apparently working on any Cotton Belt train this summer? A. I saw him going backward and forward on the train. Q. Did you see him chasing boys off the train? A. On one night the V., S. &

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P. train came in about seven o'clock, and Willie Weekly jumped on; and I think it was Tony Smith that caught him. He chased him and grabbed him around the shoulders. It was at night, but I think it was Tony Smith." W. A. Nelson, chief of police of Shreveport: "Q. During the month of July last, was Tony Smith a police officer of the city of Shreveport? A. Yes; special watchman for the railroad company. Watched the bridge down there, and had authority to act as policeman. Q. Paid by the city? A. No, sir. Q. He is a special watchman, in every sense of the word? A. Yes. Q. Do other special watchmen throughout town have authority of policeman? A. Yes. Q. He [Smith] is paid for working for private parties? A. Yes; the railroad company has him employed, just the same as watchmen are employed by the banks." Cross-examined: "Q. How did this special watchman come to be appointed? A. The railroad companies asked us to do it. They wanted a watchman down by the bridge. And then, too, there are disturbances on the cars; frequently there are. Q. Was there some complaint about little negroes jumping on and off the trains? A. Yes, sir; that is the reason we appointed him and gave him the same authority as a policeman. Last fall Mr. Hearn asked me for a man, and he paid him for that special purpose." Now, it is true that Smith himself testifies that he was not in the employ of the Cotton Belt, though he had been, off and on, for years; but he also testifies that he did not chase boys off the train, and continues as follows: "Q. You can positively swear that you have not chased them off the Cotton Belt train? A. Yes, sir; I have not. Q. And you would not have done it under any circumstances? A. No; I would not. Q. Do you mean to say that, if your duty to the Cotton Belt railroad called for such action on your part, you would not have done it? A. No; I would not,"—which testimony is entirely irreconcilable with that before quoted, which was given by witnesses apparently as worthy of belief as, and certainly more disinterested than, Smith. "But," say the learned counsel, "we

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did not stop there [with Smith's testimony]. We put the whole train crew on the stand, from the conductor down, and each and every one of them swears specifically as to who composed the train crew on the day of the accident." This is quite true, but there are two things to be said in regard to the testimony thus referred to, to wit: First, that nobody pretends that Smith was a member of the train crew; and second, that the conductor, in his testimony, not only does not include Smith as a member of the train crew, but gives us to understand that he was not on the train, though that fact can hardly be denied, and Smith swears that he was there for no other purpose than to pay a friendly visit to the conductor. In order that there may be no misunderstanding about the conductor's testimony, we quote it. J. A. Holmes, sworn on behalf of defendant: "Q. What is your occupation? A. I am a conductor. * * * Q. Do you remember the time that the boy Lewis Craig had his arm injured by being run over near the depot here? A. Yes. Q. Were you in charge of that train? A. Yes. * * * Q. by Jury. Of whom did the train crew consist? A. Of the conductor, the engineer, fireman, and porters. Q. Did anybody else have any business on that train? A. The car tenders. Q. Was anybody else—any one other than those—allowed on the train? A. No, sir. Q. Anybody else that got on, besides the train crew and car tenders, would have to get off? A. Yes." Smith, upon the other hand, testifies as follows: "Q. Are you in the habit of riding on that train? A. Yes; I have been. Q. The conductor knows you? A. Yes. Q. The train men knew you? A. Yes. Q. by the Court. Why did you take that train at the bridge, and go back on the same towards the freight yard? A. I had not seen Holmes for a long time, and I wanted to see him and ask him how he had been getting along. (Counsel continues.) Q. You say you had not seen him for a long time? A. No; I have not seen him for a long time. Q. Do you mean to say that he had not been on the train for a long time? A. Not down here. Q. He was just recently on

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down here? A. Yes. Q. The other conductor you have seen frequently? A. Yes."

With the testimony which we have thus quoted in the record, it seemed rather significant that no officer or person connected with the defendant company should have taken the stand to say that Smith was not acting for it, or with its authority, in ejecting the plaintiff from its train. But let it be conceded, *arguendo*, that the circumstance is not to be taken as corroborating the testimony tending to show that Smith was employed by the defendant. The affirmative evidence on that subject still remains, and, were it not for the statement of fact which the counsel make in their brief for rehearing, and the affidavits of other persons which they have attached thereto, it would seem sufficient for the purpose, without corroboration; and, supposing that the evidence in the record is to be controlled by statements and *ex parte* affidavits, outside the record, presented after the case has been decided on appeal, and that it should be held that Smith was not, at the moment of the infliction of the injury upon the plaintiff, in the employ of the defendant, to the knowledge of the counsel or of the officers who have furnished the affidavits mentioned, the fact still remains that he was, and had been, and continued to be, engaged in the business of ejecting boys from defendant's trains; and it would be unreasonable, where an individual is permitted to travel back and forth on the trains of a railway company, discharging certain functions to all appearances as though he were employed for that purpose, to permit such a company to escape the consequences of his acts done in the course of such apparent employment. Cooley, Torts, §§ 622-624; Lampkins v. Railroad Co., 42 La. Ann. 997, 8 South. 530; Althorf v. Wolfe, 22 N. Y. 355. The manner in which the testimony was given led the court into a misapprehension as to the relations existing between the defendant company and the Vicksburg, Shreveport & Pacific Railroad Company, but it is a matter of no consequence, and has no bearing upon the result. Rehearing refused.

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SILCOCK

v.

RIO GRANDE W. RY. CO.

(*Supreme Court of Utah, June 6, 1900.*)

Crossings—Injury to Team—Leaving Horses Untied—Contributory Negligence.*—In a suit for damages on account of plaintiff's horses having been run over and killed by defendant's train, where it appears that plaintiff had been at the place of the accident on a previous occasion when the same train passed; that plaintiff knew it was a fast train and did not stop there; that he knew about the usual time for the train to pass, and that he had not seen or heard it pass on his way to the depot; that plaintiff drove his horses to within "twenty or thirty feet" of the track, and left them standing there without tying, and went to a point about 60 feet on the other side of the track,—sufficiently shows want of ordinary care and contributory negligence on the part of plaintiff, and a nonsuit was properly granted.

Same—Same—Same—Care Required of Driver.—Where a person permits a team to stand upon a public highway in close proximity to a railroad track, or is about to cross such track, he is bound to look and listen, in order to avoid an approaching train, and the happening of an accident. *Bunnell v. Railway Co.*, 44 Pac. 927, 13 Utah 314.

Same—Care Required of Driver of Team.†—The principle which requires that a man shall use his ears and eyes in crossing a railroad track, so far as he has opportunity to do so, equally demands that he shall employ his faculties in managing his team, and thus keep out of danger. *Clark v. Railroad Co. (Utah)*, 59 Pac. 92.

Same—Injury to Team—Negligence and Contributory Negligence—Proximate Cause—Question of Law.‡—Even though it be admitted that respondent was negligent in some things, still if the evidence introduced by appellant in attempting to prove his case shows that

*See notes at end of case.

†See *Stahl v. Lake Shore & M. S. Ry. Co. (Mich.)*, 11 Am. & Eng. R. Cas., N. S., 90, and *foot-note*; *Walters v. Chicago, etc., Ry. Co. (Wis.)*, 15 *Id.* 606, and *notes*, p. 613.

‡See notes at end of case.

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his own negligence contributed to, and was the proximate cause of, the injury, the question of negligence becomes one of law, for the court. *Lowe v. Salt Lake City*, 44 Pac. 1050, 13 Utah 91.

Action for Injuries—Contributory Negligence—Burden of Proof.—Where the plaintiff in a suit to recover damages for injuries shows by his own evidence that he was guilty of contributory negligence which was the proximate cause of such injuries, the defense is relieved from the burden of proving such negligence, and the plaintiff cannot recover. *Clark v. Railroad Co. (Utah)*, 59 Pac. 92.

(Syllabus by the Court.)

APPEAL, by plaintiff from Salt Lake county district court.
Affirmed.

D. Harrington and G. M. Sullivan, for appellant.

Bennett, Harkness, Howat, Sutherland & Van Cott, for respondent.

BARTCH, C. J. This action was brought to recover damages for injury to personal property and for personal injuries claimed to have been occasioned through the negligence of the defendant. It was, among other things, alleged in the complaint that the defendant, in disregard of its duty, failed to announce the arrival of its train, and carelessly, unlawfully, and negligently ran and managed a locomotive and train belonging to it, on its track, crossing a public highway, and "that the same ran against and partially over said property," killing a span of mares, and injuring other personal property and the plaintiff. The defendant, in its answer, denied negligence on its part, and charged that the plaintiff was guilty of negligence which caused the injuries of which he complains. From the testimony of the plaintiff, it appears that on January 29, 1898, he went with his team to defendant's railway station to purchase coal. When he arrived there he stopped his team at a point on the public road "twenty to thirty feet" from the railway track, facing the same. He then applied the brake, and tied the lines to his wagon, and went to the depot, on the north side of the highway, to arrange with the agent for the coal. The agent not being there, he

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stepped west across the track, about 60 feet, to the coal bins, to ascertain if there was any coal to be had. While there he heard the rumbling of an incoming train, which was then close to the station, and hastened back to his team, and got into the wagon and hold of the lines, when his horses became frightened and unmanageable and collided with the train. The injuries resulted from the collision. The whistle on the engine was not blown, nor the bell rung, until immediately at the crossing. It was the north-bound passenger train, called the "Flyer," running at a rate of 50 to 60 miles an hour. That train, according to plaintiff's testimony, generally passed there somewhere "about a quarter to twelve," but on this occasion it arrived about "half past twelve or a quarter to one." The plaintiff had not noticed it come, but supposed that it had gone. He testified that this particular train generally went through there rapidly,—rapidly enough to probably frighten his team. He also testified that on a previous occasion, with a load of beets, he stopped at the same place while the train was passing, sat in the wagon, and held the team. Such are, substantially, the material facts shown by the plaintiff's testimony. After he rested his case the defendant made a motion for a nonsuit upon the grounds that no negligence on the part of the defendant was shown, and that the evidence shows that the plaintiff was guilty of negligence which contributed proximately to the injury. The motion was sustained, and the plaintiff appealed.

The decisive question presented is, was the appellant guilty of such contributory negligence as prevents his recovery? That is, assuming that the respondent was negligent in not sounding the whistle or ringing the bell at a proper distance from the public crossing, was the appellant guilty, as shown by his own evidence, of negligence which contributed proximately and materially to the accident, so that, as matter of law, he cannot be permitted to recover? Due consideration of the facts and circumstances appearing in evidence impels the conclusion that this question must be

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answered in the affirmative. The proof leaves no room for doubt that if the appellant had proceeded with ordinary care about the railway station, he could have averted the accident. He was there on a previous occasion with his team when the same train passed at a rapid rate of speed, and knew that it was a fast train, and would probably frighten his horses in passing them. He knew about the usual time when it passed the crossing, and that it did not stop there ; and, although the regular time for its arrival had passed, still he had not seen nor heard it pass, on his way to the depot. Aware of these things, he had no right to assume that it had passed. He was chargeable with knowledge of the fact that the train might be late, and that it or any other train might pass there at any time ; the track on which the train was running being the main line of the respondent's system. Under such circumstances, for the appellant to drive his horses to within "twenty or thirty feet" of the track, and then leave them standing there on the highway alone, without being tied, and without, so far as appears from the evidence, looking or listening for a train, and go to the depot, thence to the coal shed, 60 feet across the track,—the team remaining all the while so untied,—is, to say the least, culpable negligence. Suppose by the striking of the team the train had been derailed and some person killed ; would not the act of thus carelessly leaving the team within 20 or 30 feet of the track, unattended, have been characterized as gross negligence? Yet the more serious consequence would not have changed the character of the act. The appellant was bound to exercise ordinary care, and that, according to the facts disclosed, demanded that the team should be left at a greater distance from the track, or at least securely tied. Such care also required him to look and listen for an approaching train before and after leaving his team. No rule of law authorizes a person to thus recklessly leave his team upon the highway, within a few feet of a railway track, unattended, and not even tied. In *Bunnell v. Railway Co.*, 13 Utah 314, 44 Pac.

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927, where the plaintiff had turned his cattle upon the highway in the vicinity of a railway track, unattended, and one of them was killed by a passing train, this court said: "A proper regard for the safety of humanity and of property forbids that a person should turn his beasts, which can neither reason nor appreciate danger, out upon the highway, without a keeper, in the vicinity of a railway crossing; and especially is this true where such person knows that they must cross the track to get to the pasture where their instinct leads them. The sacredness of human life, and common sense, alike dictate this rule."

Although he thus left his team upon the public highway, there is nothing in the testimony to show that the appellant either looked or listened for this or any train, either before or after arriving at the depot, until he heard the rumbling noise as the train approached; and yet it appears that there was nothing to obscure his vision, and that one could see a quarter of a mile or more down the track. If, therefore, the appellant, even after he had so left his team, had used his senses, as the law required him to do, he could, in all probability, have averted the accident. Having left his team in such a reckless manner, and having failed, as indicated by the record, to look and listen or use his senses, he is in no position to complain that the whistle was not sounded, nor the bell struck, nor of any failure of the respondent to give notice of the arrival of trains, because his own carelessness contributed so far to the accident that he has no right to complain of others. Negligence of the respondent in these particulars, if there was any, was no excuse for negligence on his part. Where a person permits a team to stand upon a public highway in close proximity to a railroad track, or is about to cross such track, he is bound to look and listen, in order to avoid an approaching train, and the happening of an accident. Ordinary care, under such circumstances as are disclosed in this case, requires this. In *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542, where a lady was killed by an approach-

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ing train, MR. JUSTICE FIELD, delivering the opinion of the court, said: "She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so

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far contributed to her injuries as to deprive her of any right to complain of others." The appellant having been familiar with the locality of the crossing, and knowing that a train was liable to pass there at any time, and that the train in question was usually run at a high rate of speed without stopping at that place, it was negligence on his part to place himself and team in such a position that he could not control it when the train passed them. "The principle which requires that a man shall use his ears and eyes in crossing a railroad track, so far as he has opportunity to do so, equally demands that he shall employ his faculties in managing his team, and thus keep out of danger." *Salter v. Railroad Co.*, 75 N. Y. 273; *Schaefer v. Railway Co.*, 62 Iowa 624, 17 N. W. 893; *Railroad Co. v. Talbot*, 48 Neb. 627, 67 N. W. 599; *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; *Brady v. Railway Co. (Neb.)*, 80 N. W. 809; *Railway Co. v. Howard (Ind. Sup.)*, 24 N. E. 892; *Stahl v. Railroad Co.*, 117 Mich. 273, 75 N. W. 629.

Nor did the fact that this particular train was behind time relieve the appellant from his duty of exercising ordinary care at and about the railroad crossing, to avoid accident. Railroad corporations have the right to run their trains at any and all times, and travelers upon a highway, at a railway crossing, are entitled to no exemption from care and vigilance because trains are not run at regular schedule time. In *Clark v. Railroad Co.*, 59 Pac. 92, this court, speaking through MR. JUSTICE BASKIN, said: "A railroad has as much right to use special trains as to use reg-

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ular trains. As to how many or at what time a railroad company shall run trains over its track, is not restricted by law. It is a matter of common knowledge that the necessities of railroad transportation require the frequent use of special trains, and that such trains are liable to pass along the track at any time."

Nor can the fact that the train in question was run at a high rate of speed avail the appellant. The accident happened at a highway crossing in the country,—outside, so far as shown by the testimony, of the limits of any village or city,—where the railroad company was not limited to any particular rate of speed. The company was therefore entitled not only to run its trains at any and all times to suit the business demands of the people, but also at such rate of speed as the condition of its roadbed would permit, so as to afford rapid transit to the public; and there is nothing to show that the train in question was run more rapidly than the condition of the roadbed warranted. In *Bunnell v. Railway Co.*, *supra*, this court said: "Unless the condition of its road demands it, a railroad company is not required to run its trains at a low rate of speed through a sparsely-settled country, or to check the same at ordinary highway crossings, outside of cities and villages, and to do so would greatly interfere with its usefulness as a common carrier."

If it be admitted that the respondent was negligent as to some of the matters referred to, still the evidence introduced by the appellant in attempting to prove his case shows clearly that his own negligence contributed to, and was the proximate cause of, the injury. The irre-
sistible conclusion from an examination of all the testimony is that the proof is of such a character that, if taken with every legitimate inference which a jury could justifiably draw from it, it is insufficient to support a verdict. In such case the question of negligence is one of law, for the court. The nonsuit was therefore properly granted. *Lowe v. Salt Lake City*, 13

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Notes

Utah 91, 44 Pac. 1050. Where the plaintiff, in a suit to recover damages for injuries, shows by his own evidence that he was guilty of contributory negligence which was the proximate cause of such injuries, the defense is relieved from the burden of proving such negligence, and the plaintiff cannot recover. This court, in *Bunnell v. Railway Co.*, *supra*, as to the question of contributory negligence, said: "Generally contributory negligence is a matter of defense, and must be alleged and proven by the defendant; but where the testimony on the part of the plaintiff, who seeks to recover damages for injuries resulting from negligence, shows conclusively that his own negligence or want of ordinary care was the proximate cause of the injury, he will not be permitted to recover, even though the answer contains no averment of contributory negligence." *Clark v. Railway Co.* (Utah), 59 Pac. 92; *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; *Pepper v. Southern Pac. Co.*, 105 Cal. 389, 38 Pac. 974; *Salter v. Railway Co.*, 75 N. Y. 273; *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542; *Railroad Co. v. Talbot*, 48 Neb. 627, 67 N. W. 599; *Brady v. Railway Co.* (Neb.), 80 N. W. 809.

We discover no reversible error in the record. The judgment is affirmed, with costs.

MINER and BASKIN, JJ., concur.

NOTES.

Leaving Team Unhitched near Crossing—Contributory Negligence.—To leave unhitched and unattended, within nineteen feet of a railroad track, a team of horses, young, high-lifted, and afraid of the cars, is negligence as a matter of law. *Olson v. Chicago, M. & St. P. R. Co.*, 81 Wis. 41, 50 N. W. Rep. 412, 1096. See *note*, 5 Am. & Eng. R. Cas., N. S., 300.

Accident at Crossing—Failure to Give Signals Does Not Excuse Contributory Negligence.—See *note* to *Price v. Cumberland & P. R. Co.* (Md.), 10 Am. & Eng. R. Cas., N. S., 518. See also *Swanson v. Central R. Co. of New Jersey* (N. J.), 16 Am. & Eng. R. Cas., N. S.,

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624; Crawford v. Chicago G. W. Ry. Co. (Iowa), 16 *Id.* 628; Hunter v. Montana Cent. Ry. Co. (Mont.), 16 *Id.* 615; Conkling v. Erie R. Co. (N. J.), 15 Am. & Eng. R. Cas., N. S., 61.

Contributory Negligence Established by Evidence of Plaintiff—Nonsuit Proper.—A nonsuit is proper where the plaintiff's declaration or evidence discloses his own negligence. Washington, etc., R. Co. v. Gladmon, 15 Wall. (U. S.) 401; McQuilken v. Central Pac. R. Co., 50 Cal. 7; Plunkett v. Central of Georgia, 13 Am. & Eng. R. Cas., N. S., 860; Ryan v. Louisville, etc., R. Co., 44 La. Ann. 806; Frech v. Philadelphia, etc., R. Co., 39 Md. 574; Lincoln v. Walker, 18 Neb. 244, 5 Am. & Eng. Corp. Cas. 610; Winship v. Enfield, 42 N. H. 197; New Jersey Express Co. v. Nichols, 33 N. J. L. 434; Conkling v. Erie R. Co. (N. J.), 15 Am. & Eng. R. Cas., N. S., 61; Berry v. Pennsylvania R. Co., 48 N. J. L. 141, 26 Am. & Eng. R. Cas. 396; Baltimore, etc., R. Co. v. Whitacre, 35 Ohio St. 627; Ritzman v. Philadelphia & R. R. Co. (Pa.), 12 Am. & Eng. R. Cas., N. S., 444; Boss v. Providence, etc., R. Co., 15 R. I. 149, 21 Am. & Eng. R. Cas. 364; Prideaux v. Mineral Point, 43 Wis. 513, 28 Am. Rep. 558.

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v.

FORSHEE *et al.**(Supreme Court of Alabama, April 10, 1900.)*

Crossings—Duty to Stop, Look, and Listen.*—It is the duty of a person approaching the track of a railway for the purpose of crossing it to stop, and to look, and to listen, if the exercise of the sense of sight does not suffice to fully disclose the situation, for approaching trains, and the omission of this duty, followed by injury in collision with a train, locomotive or car while attempting thus heedlessly to cross over the track, is, as matter of law, negligence on the part of the traveler, so contributing to the result as to defeat his action counting on the injury as having been produced by the simple negligence of the railway company or its employees.

*See Illinois C. R. Co. v. Jones (C. C. A.), 15 Am. & Eng. R. Cas., N. S., 16; Coppuck v. Philadelphia, etc., R. Co. (Pa.), 15 *Id.* 68; Hearn v. N. Y., etc., R. Co. (Md.), 15 *Id.* 54; Atchison, etc., R. Co. v. Willey (Kan.), 15 *Id.* 847; *note*, 12 *Id.* 444 *et seq.*

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Same—Same.—A traveler approaching a railway for the purpose of crossing it must stop so near the track, and his survey by sight and sound must so immediately precede his effort to cross over it, as to preclude the injection of an element of danger from approaching trains into the situation between the time he stopped, looked, and listened, and his attempt to proceed across the track.

Same—Same.—If a traveler approaching a railway track for the purpose of crossing it lingers near the track after stopping there and looking and listening for trains, and delays crossing until a train not in sight or hearing has come meantime upon the scene, and collides with him when he does attempt to cross he negligently contributes to his injury resulting from the collision.

Same—Attempting to Cross after Seeing Train.*—If a traveler, seeing a train approaching, misjudges its speed, or, for any other reason, his own ability to cross the track before it reaches the point of crossing, and attempts to cross, and is struck by the train and injured, he is guilty of negligence, and cannot recover for the negligence of, or imputable to, the company, unless its agents were wanting in due care to conserve his safety after they became aware of his peril.

Accident at Crossing—Unwarranted Panic—Liability of Company.—The fact that a traveler's unwarranted panic was the cause of his attempt to cross a railroad track in front of an approaching train, by which he was injured, does not render the railroad company liable for the injury. And the law takes no account of personal idiosyncracies and peculiarities which produce panic without cause.

Same—Negligence and Contributory Negligence.†—Where a person killed by a train while attempting to cross a railroad track was guilty of negligence in making the attempt, such negligence is to be held a contributing cause of her death, along with any proved antecedent negligence of the trainmen, such as failing to give street-crossing signals, or excessive speed, or speed prohibited by an ordinance of the municipality, so as to bar recovery for the death.

Same—Duty to Maintain Lookout—Pleading.‡—A count of a complaint averring that plaintiff's intestate was killed by defendant's train at a street crossing in an incorporated town sufficiently shows that defendant was under a duty to keep a lookout for her at the time

**Mott v. Detroit, etc., Ry. Co. (Mich.)*, 15 Am. Eng. R. Cas., N. S., 114, and *foot-note*; *Gilbert v. Erie R. Co. (C. C. A.)*, 18 *Id.* 15.

†*See Louisville & N. R. Co. v. Penrod's Adm'r (Ky.)*, 17 Am. & Eng. R. Cas., N. S., 760, and *foot-note*; *Hunter v. Mont. Cent. Ry. Co. (Mont.)*, 16 *Id.* 615; *Peterson v. St. Louis, etc., Ry. Co. (Mo.)*, 18 *Id.* 161; *Tucker v. Chicago, etc., Ry. Co. (Mich.)*, 18 *Id.* 155.

‡*See Garner v. Trumbull (C. C. A.)*, 15 Am. & Eng. R. Cas., N. S., 589, and *foot-note*.

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and place of the collision, and to exercise care for her safety. And such a count is not fatally defective because its averment of negligence merely states in general terms that negligence in the management of the train was the cause of the death.

Same—Negligence—Pleading.—Such averment of negligence is sufficiently broad to cover the negligence of the engineer in failing to use all the means at his command after discovering the peril of plaintiff's intestate to stop his train before reaching her so as to afford her time and opportunity to get off the track before the locomotive reached the point at which she was attempting to cross.

Same—Negligence after Discovering Traveler's Peril—Contributory Negligence.*—If there was such negligence on the part of the engineer, and it had a causal connection with the death of plaintiff's intestate, the negligence of the latter in going, and being upon the track, would be no defense to the action for her death.

Same—Same—Question for Jury—Contributory Negligence—Willfulness or Wantonness.—The engineer saw the peril of plaintiff's intestate in time to put on the emergency brake and to reverse his engine and to sound the alarm whistle before his engine reached the crossing; and he did sound the whistle and put on the emergency air brakes, but did not reverse his engine. *Held*, that it was a question for the jury whether the failure to reverse the engine was not negligence, and was not the cause of the death; and that a charge that contributory negligence was a defense to all the counts of the complaint except those charging willfulness or wantonness on the part of defendant's employees was warranted.

Negligence—Willfulness or Wantonness—Pleading—Amendment—Departure.—To a complaint charging only simple negligence an amendment may be allowed charging willfulness or wantonness, if the amendment counts upon the same transaction as that counted upon in the original complaint.

Same—Same—Same.—A count of a complaint alleging that defendant's employees recklessly and wantonly ran the train, while approaching the crossing, at such a high rate of speed that they could not stop it before reaching the crossing, after they had attained a point of view 200 yards away, from which they could see a person on the track at the crossing if a person were there, and that the uses of the crossing was such that it was probable some person would be on it at the time such point of view was reached by the trainmen, does not sufficiently charge wantonness against such employees.

Same—Same—Same.—A general averment that defendant's employees wantonly or willfully ran the train against the intestate and killed her, without more, is sufficient; but when to such general

*See notes, 12 Am. & Eng. R. Cas., N. S., 332 *et seq.*

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avermment is added a statement of the facts, and these, while they may involve negligence, do not support the charge of wantonness or willfulness, the count is fatally defective as one for wantonness or willfulness, and is bad as one for negligence, because of the inconsistency of its averments.

APPEAL by defendant from Birmingham city court.
Reversed.

The first count of the amended complaint reads as follows: "First Count. The plaintiffs claim of the defendant twenty thousand dollars damages, for that the defendant owned and operated a railroad from Columbus, in the state of Georgia, to Birmingham, in the state of Alabama, upon and over which defendant ran engines and trains of cars, propelled by steam, for the transportation of passengers and freight for hire; that on, to wit, the 15th day of December, 1897, the defendant's agents and servants, while engaged in running an engine, to which was attached a train of cars, upon and over said railroad between Birmingham, Alabama, and Columbus, Georgia, so negligently and carelessly conducted themselves in and about the management of said engine and train of cars that the said engine was caused to run against plaintiff's intestate, Mary Auther, at a street crossing within the limits of the town of Goodwater, in Coosa county, Alabama, a station on defendant's railroad, thereby causing the death of the said Mary Auther." The other allegations of negligence amended complaint is as follows: "The plaintiffs claim of the defendant twenty thousand dollars damages, for that the defendant owned and operated a railroad from Columbus, in the state of Georgia, to Birmingham, in the state of Alabama, upon and over which defendant ran engines and trains of cars, propelled by steam, for the transportation of passengers and freight for hire; that on, to wit, the 15th day of December, 1897, plaintiff's intestate was lawfully crossing said railroad at a public street crossing within the limits of the town of Goodwater, in Coosa county, Alabama, a station on defendant's said railroad, and defendant's agents and servants while engaged in running an engine, to which was

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attached a train of cars, upon and over said railroad between Birmingham, Alabama, and Columbus, Georgia, so negligently and carelessly conducted themselves in and about the management of said engine and train of cars, that the said engine was caused to run against plaintiff's intestate, Mary Auther, at said public street crossing, thereby causing the death of said Mary Auther. (2) Defendant's agents and servants, while running an engine to which was attached a train of cars upon and over said railroad between Birmingham, Alabama, and Columbus, Georgia, negligently and carelessly failed to blow the whistle or to ring the bell at least one-fourth of a mile before reaching said public street crossing in the town of Goodwater, Alabama, and to continue to blow the whistle or to ring the bell at short intervals until said engine and train of cars passed such crossing, and by reason of such failure the said engine and train of cars were caused to run against plaintiff's intestate, the said Mary Auther, at the said street crossing in the said town of Goodwater, thereby causing her death. (3) Defendant's agents and servants while engaged in running an engine and train of cars upon and over said railroad between Birmingham, Alabama, and Columbus, Georgia, negligently and carelessly caused an engine and train of cars to approach and cross said public street crossing in the town of Goodwater, Alabama, where a foot passenger walking along said street and across said railroad track, or an obstruction at the said crossing, could not be seen by the engineer or other person or persons, agents, and servants of defendant operating and managing said engine and train of cars for a distance of two hundred yards before arriving at said street crossing, owing to a cut through which said railroad passed on a curve. The street crossed said railroad track at the southern or southeastern end of said cut, and within the limits of the said town of Goodwater. And on said 15th day of December, 1897, said engine and train of cars was caused to run in a southeastern direction, going from Birmingham, Alabama, to Columbus, Georgia, at such a high

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rate of speed that the engine and train of cars could not be so managed by such agents and servants of the defendant, after they had arrived within a distance from which they could have discovered a person or an obstruction on the track at the said crossing, as to prevent an accident in the event a person or an obstruction was at the said crossing; and said engine and train of cars, so operated, run, and managed as aforesaid, ran against the plaintiff's intestate at the street crossing aforesaid on the 15th day of December, 1897, thereby causing her death." "(5) That while the plaintiff's intestate, said Mary Auther, was crossing the track of defendant's said railroad at a public street crossing within the limits of the town of Goodwater, Alabama, which is a populous town, of over five hundred inhabitants, and a station on said railroad, an engine and train of cars going from the direction of Birmingham, Alabama, in the direction of Columbus, Georgia, which is a southeastern direction, operated and managed by the servants and agents of the defendant, ran against her, the said Mary Auther, thereby causing her death; that said street crossed defendant's railroad track at the southern or southeastern end of a deep cut, through which the defendant's said railroad track passed on a curve, and the sides of said cut, and the elevation through which it was made, so obstructed the view of the agents and servants of defendant when running an engine and a train of cars in the direction of Columbus, Georgia, that they could not see a person or an obstruction at the street crossing where the engine ran against the said Mary Auther, causing her death, as aforesaid, in the event a person or an obstruction was there, until they arrived within two hundred yards of said crossing; that on said 15th day of December, 1897, the defendant's agents and servants, well knowing of the street crossing, and that it was a main thoroughfare in a populous town, and that people there crossed the railroad track of defendant frequently every day, and that some person would probably be crossing said track at said time and place, in disregard of the rights of the public and of plain-

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tiff's intestate to cross said railroad track at said place, and being wholly indifferent to the consequences of the acts and conduct, recklessly and wantonly propelled said engine and train of cars there along, going in the direction of Columbus, Georgia, neglecting to give necessary signals sufficient to warn persons of the approach of said train, and at such rapid speed that said engine and train of cars could not be checked or stopped after the agents and servants of defendant operating and managing the same were near enough to discover a person or an obstruction on the railroad track at said street crossing, in the event a person or an obstruction was there, in time to prevent an accident at the crossing, thereby greatly and unnecessarily endangering the lives of persons who would probably be crossing said railroad track at said place, which acts and conduct of the defendant's agents and servants caused the said engine to run against the said Mary Auther at said street crossing on said 15th day of December, 1897, causing her death, as aforesaid. (6) That on, to wit, the 15th day of December, 1897, the defendant's agents and servants, while engaged in running an engine, to which was attached a train of cars, upon and over said railroad, between Birmingham, Alabama, and Columbus, Georgia, recklessly and wantonly, or intentionally, ran said engine and train of cars against plaintiff's intestate, Mary Auther; at a street crossing within the limits of the town of Goodwater, in Coosa county, Alabama, a station on defendant's said railroad, thereby causing the death of said Mary Auther." "(8) That on, to wit, the 15th day of December, 1897, plaintiff's intestate was lawfully crossing said railway at a public street crossing within the limits of the town of Goodwater, Alabama, a station on defendant's said railroad, and the defendant's agents and servants, while running an engine and train of cars upon and over said railroad between Birmingham, Alabama, and Columbus, Georgia, negligently and carelessly ran said engine and train of cars at a greater rate of speed than six miles per hour within the corporate limits of the said town of Goodwater, Alabama, which said town

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is incorporated under the laws of Alabama, and in violation of an ordinance of said town of Goodwater in the words and figures as follows: 'Sec. 69. Be it further ordained and enacted that it shall be unlawful for trains to run at a greater rate of speed than six miles per hour within the incorporate limits of the town of Goodwater, Ala., and any engineer or conductor who shall cause any engine or train to run at a greater rate of speed than six miles an hour within the corporate limits of said town shall be guilty of a misdemeanor and on conviction thereof shall be fined not less than five nor more than twenty-five dollars.' And by reason of such negligence and carelessness the said engine and train of cars were caused to run against plaintiff's intestate, the said Mary Auther, at said public street crossing in said town of Goodwater, thereby causing her death."

Defendant demurred to the first count of the complaint as follows: "(1) It is not shown how or in what manner the defendant owed the plaintiff's intestate any duty which it neglected or violated. (2) Because it is not shown how or in what manner the alleged negligence caused or contributed to the injury complained of. (3) It is not shown in said count that the street crossing was such a road crossing as is embraced in the statute." There were demurrers interposed to the second and third counts, but it is unnecessary to set them out. To the fifth count, as amended, the defendant demurred upon the following grounds: "(1) Because said count seeks to recover of this defendant for its alleged wanton and recklessly negligent conduct, and fails to allege or show any facts constituting wanton or recklessly negligent conduct. (2) Because said count is repugnant and inconsistent, in this: In one portion it charges this defendant with the omission of statutory duties in running said train at a reckless, unwarranted, and dangerous rate of speed, which constitutes but simple negligence, and yet in another portion of said count the plaintiff denominates said omissions of duty and rate of speed wantonness or willfulness. (3) That said count

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sets up a new and independent cause of action. (4) That said count is a departure from the original cause of action."

The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

The charges given at plaintiff's request are as follows:

"(4) If the jury believe from the evidence that the agents and servants of defendant recklessly and wantonly ran an engine and train of cars against Mary Auther at a public street crossing in the town of Goodwater, Alabama, and killed her, the defendant is liable in this action, whether Mary Auther was guilty of contributory negligence or not.

(5) The undisputed evidence in this case shows that the defendant's agents were guilty of negligence in the management of the train which struck and killed Mary Auther, and, if this negligence was the sole cause of her death, the jury should return a verdict in favor of the plaintiff. (6) To establish the plea of contributory negligence, the defendant must show by the weight of the evidence that Mary Auther failed to exercise reasonable care in the attempt to cross defendant's railroad track." To the giving of these charges the defendant separately excepted, and also separately excepted to the court's refusal to give, among others, the following written charges requested by it: "(4) If you believe the evidence, you will find for the defendant on the first count. (5) If you believe the evidence, you will find for the defendant on the second count. (6) If you believe the evidence, you will find for the defendant on the third count. (7) If you believe the evidence, you will find for the defendant on the fifth count. (8) If you believe the evidence, you will find for the defendant on the sixth count. (9) If you believe the evidence, you will find for the defendant on the eighth count." "(20) I charge you, gentlemen of the jury, as a matter of law, that Mrs. Auther was guilty of contributory negligence, which prevents her administrator recovering on those counts of the complaint charging simple negligence." "(24) I charge you that under the laws of

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this state a person cannot be punished for the willfulness, wantonness, or maliciousness of his agent or servants, if he neither authorizes (sanctions) such willfulness, wantonness, or maliciousness, nor ratified or approved it; and the same rule applies to corporations as to individuals, whether the agent or servant who has been willful or wanton is an inferior agent or servant or not." "(37) I charge you that the failure of the engineer to ring the bell, if you find that he did fail to ring the bell, would not, under the evidence in this case, be willful, wanton, or reckless negligence. (38) If the jury believe all the evidence, they will find that the engineer was not guilty of any willful or wanton negligence." "(54) I charge you that the plaintiffs' intestate was guilty of negligence in attempting to cross in front of the train which would defeat plaintiffs' right to recover on all the counts in the complaint charging simple negligence only. (55) If from the evidence in this cause your minds should be equally balanced as to whether or not the natural and probable consequences of the defendant's train being run in the manner in which it was would be to inflict injury to person or property at the crossing where the injury occurred, then you must find for the defendant." "(57) I charge you that it was the duty of plaintiffs' intestate, Mary Auther, to stop, look, and listen when she got near enough to the crossing where the injury occurred to see defendant's train, and, if she failed to stop at such point, she was guilty of negligence contributing proximately to the cause of her injury; and if she looked, and saw the train, and undertook to cross in front of it, she was guilty of negligence contributing proximately to the cause of her injury, and the plaintiffs in this cause could not recover, unless you further find from the evidence that the natural and probable consequence of the defendant's running the train in the manner in which it was run was to inflict injury to some person or property at the crossing where the injury occurred."

John Loudon, for appellant.

Smith & Smith and *Lewis E. Parsons*, for appellees.

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MCCLELLAN, C. J. That it is the duty of a person approaching the track of a railway for the purpose of crossing it to stop, and to look, and to listen, if need be (that is, if the exercise of the sense of sight does not suffice to fully disclose the situation), for approaching trains, and that the omission of this duty, followed by injury in collision with a train, locomotive, or car while attempting thus heedlessly to cross over the track, is, as matter of law, negligence on the part of the traveler, so contributing to the result as to defeat his action counting on the injury as having been produced by the simple negligence of the railway company or its employees, are propositions of such universal acceptance, of such frequent declaration by this court, and of such obvious soundness, that we shall neither discuss them nor cite authorities in support of them. It is equally clear, on principle and authority, that this duty must be performed at such time and place with reference to the particular situation in each case as will enable the traveler to accomplish the purpose the law has in view in its imposition upon him. He must stop so near to the track, and his survey by sight and sound must so immediately precede his effort to cross over it, as to preclude the injection of an element of danger from approaching trains into the situation between the time he stopped, looked, and listened, and his attempt to proceed across the track. If he stops so far from the railway as that a train which could not be seen from that point could and does reach the crossing by the time he has traversed the intervening distance and gotten on the track, he negligently contributes to the resulting collision and injury. And the same is true if, though he stop at the track, he lingers there after looking and listening, and delays crossing until a train not in sight or hearing when he stopped, looked, and listened has come meantime upon the scene, and collides with him when he does attempt to cross. It is also thoroughly well settled that if such traveler sees a train approaching, misjudges its speed,

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Same—Same.

Same—Same.

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or, for any reason, his own ability to cross before it reaches the point of crossing, and makes the attempt, and is stricken and injured, he is likewise guilty of negligence, and cannot recover for the negligence of, or imputable to, the company, unless its agents were wanting in due care to conserve his safety after they became aware of his peril; that is, either of his presence on the track, or of his purpose, indicated by his movements, to go upon the track in front of the train.

Same—Attempt-
ing to Cross
after Seeing
Train.

All the foregoing doctrines have application to this case. Plaintiffs' intestate went upon the track of defendant's railway in front of a rapidly approaching locomotive, drawing a train of cars, in an attempt to cross over the track. She was there stricken by the locomotive and killed. There is evidence from which it might be inferred that she did not see or hear the train, and, without stopping to look and listen at the proper time and place, or at all, for that matter, went upon the track in ignorance of its approach. That by stopping and looking and listening she could have ascertained that the train was approaching and was dangerously near, is entirely clear on the evidence. Indeed, it is not possible to conceive that any foot traveler need or could, with the proper use of his senses, ever go upon a railway in ignorance of the approach of a train sufficiently near to strike him before he crosses over it. No curve, even in a deep cut, that a train can be operated upon, can be so acute as to deprive him of the opportunity, while standing beside the track, to acquaint himself with the fact of the train's approach in time to refrain from attempting to cross in front of it. On this aspect of the evidence, the intestate was, as matter of law, unquestionably guilty of negligence in attempting to cross the track without stopping and looking and listening for the train that killed her. There was other evidence in the case to the effect that the intestate did stop and did look before going on the track, and did see the train approaching, and that thereupon, with full knowledge of its approach, she attempted to cross in front of it, and so was run

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against and killed. If these were the facts, she was equally guilty of negligence. It is probable that this last phase of the evidence presents the real facts. But it does not matter whether the one or the other phase is the true one. The whole evidence, without the slightest conflict, shows that she either went upon the track without stopping to look and listen, or that she did stop and look when the train was in plain view, and then went on the track, in an effort to cross it, in front of the nearly and rapidly approaching locomotive and train. And upon either phase of the evidence she was guilty, as matter of law, of negligence, in attempting to cross the track at that time and place. Nor was she in any degree relieved from the imputation of negligence by other alleged circumstances attending her attempt to cross, which counsel for appellees insist bewildered and confused her to such an extent that it was open for the jury to find that she acted with all the care required of her, in view of the panic under which she labored. There is a doctrine, fully approved by this court, to the general effect that where the party injured was suddenly placed, by the wrong of the defendant, in a position of extreme and imminent peril, necessitating, to his extrication, quick decision and action on his part, he will not be held to the same correctness of judgment and action as if he had time and opportunity to fully consider the situation, and to choose the best means of escaping the peril; or, in other words, adopting a formulation of this principle which has been approved by this court, where, by the negligence of the defendant, or those for whom he is responsible, the plaintiff has been suddenly placed in a position of extreme peril, and thereupon does an act which, under the circumstances known to him, he might reasonably think proper, but which those who have a knowledge of all the facts, and time to consider them, are able to see was not in fact the best, the defendant cannot insist that under the circumstances the plaintiff has been guilty of negligence. "Perfect presence of mind, accurate judgment, and promptitude under all circumstances are

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not to be expected. You have no right to expect men to be something more than ordinary men." *Iron Co. v. Andrews*, 114 Ala. 243, 257-259, 21 South. 440, 444. But this doctrine can have no application here. The intestate, when she started upon the act which cost her her life, was not in a position of peril, extreme or otherwise. She was, to the contrary, in an absolutely safe position. And not only was it safe in point of fact, but it was obviously so to the perceptions and comprehension of any ordinary man. Any ordinary man or woman standing as she was by the side of the track, and out of the way of the approaching locomotive, when she saw the train (and, of course, if she did not see it, this doctrine could not apply in any event), would have known that that was a place of safety, and would have had no hesitation or doubt as to the propriety of remaining there. And courts in these matters deal only with ordinary people. That is the sort of man which constitutes the standard by which all men and women are to be judged on the question of negligence *vel non*. We "have no right to expect men to be something more than ordinary men," but must expect them to be ordinary men, and their actions must in all cases be adjudged upon the assumption that they are ordinary men. The law takes no account of personal idiosyncracies and peculiarities which produce panic without cause, and thus lead to negligent and rash action. The test of due care in a given instance is not what the individual involved in that instance would always do under the circumstances, but what a man of ordinary care and prudence would do under the circumstances. And in this case, as no man of ordinary care and prudence would have attempted to rush from a place of safety across the track in front of this locomotive, the act must be held negligent and rash on the part of the intestate. It is of no consequence that she was panic-stricken, and hence thought she was in danger, and that that was her only means of escape. She must have been in danger, which she was not; and she must have reasonably thought the course she took was the best, which she could not have done, since there

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was no ground for so thinking. These plaintiffs cannot hold the defendant responsible for the results of her unwarranted panic.

Plaintiffs' intestate having thus been guilty of negligence in going upon defendant's track, that negligence is to be held a contributing cause to her death, along with any alleged and proved antecedent negligence of the defendant's employees, so as to bar a recovery by the plaintiffs for such negligence. There are three counts in the complaint which charge such antecedent negligence on the part of defendant. The second count avers as the cause of the injury the failure of defendant's employees "to blow the whistle or ring the bell at least one-fourth of a mile before reaching said public street crossing in the town of Goodwater, Alabama, and to continue to blow the whistle or ring the bell at short intervals until said engine and train of cars passed such crossing." The third count ascribes the disaster to the negligence of defendant's employees in running the train at such a great rate of speed in approaching the crossing as that they were unable to stop it before reaching the crossing after they had arrived at a point from which they could first see an obstruction or person on the track at the crossing. And the eighth count alleges as the cause of intestate's death that the defendant's agents negligently and wantonly ran the engine and train of cars within the corporate limits of the town of Goodwater at a greater rate of speed than six miles per hour, in violation of an ordinance of the municipality limiting the speed of trains to that rate. There was evidence tending to prove the negligence laid in each of these counts, but, of course, the contributory negligence of the intestate was a complete defense to each of them; and, that being shown by the uncontroverted evidence, the court should have given the affirmative charge, with the hypothesis which was requested by the defendant as to each of them. The trial court erred, also, in those parts of its general charge which relate to this matter.

Same—Negli-
gence and Con-
tributory Negli-
gence.

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There were demurrers to the second and third counts, but as it seems very improbable, to say the least, that those counts will cut any figure in the case hereafter, we deem it unnecessary to consider the demurrers. For the same reason, we shall pretermit consideration of the validity and admissibility in evidence, as offered, of the ordinance set up in the eighth count.

The first count of the complaint avers that intestate was killed at a public street crossing in the town of Goodwater. This averment shows that defendant was under a duty to keep a lookout for her at the time and place of the collision, and to exercise care in conservation of her safety. The averment of negligence on the part of defendant's employees is very general, but, the duty of care being shown, it is sufficient. *Armstrong v. Railway Co. (Ala.)*, 26 South. 349. It is sufficiently broad to cover the negligence of the engineer in failing to use all the means at his command after discovering the peril of the intestate to stop his train before reaching her, or to lessen its speed so as to afford her time and opportunity to get off the track before the locomotive reached the point at which she was attempting to cross it; and this count is to be taken as averring such negligence. If there was such negligence, and if it had a causal connection with the result complained of, the negligence of the intestate in going and being upon the track would be no defense to the action. Her negligence would not be the cause of the injury, or contributory thereto, but merely the cause of a condition upon which the negligence of the engineer in failing to use all means in his power to avoid the injury after becoming aware of her peril operated to and as the sole cause of her death. *Tanner's Ex'r v. Railroad Co.*, 60 Ala. 621; *Railroad Co. v. Brown (Ala.)*, 25 South. 609; *Railway Co. v. Lamb (Ala.)*, 26 South. 969. We think there was evidence of such negligence on the part of the engineer, and that there

Same—Duty to
Maintain Look-
out—Pleading.

Same—Negli-
gence—Pleading.

Same—Negli-
gence after Dis-
covering
Traveler's Peril
—Contributory
Negligence.

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was also evidence tending to show that it caused the death of plaintiffs' intestate. The engineer saw the peril of the woman in time to put on the emergency air brake and to reverse his engine and to sound the alarm whistle before his engine reached the crossing. He did, in fact, sound the alarm and put on the emergency air brakes. But he did not reverse his engine. He testified in this connection as follows: "I know of nothing else that could have been done that would have prevented a collision. What I did is regarded as the most effective way of stopping a train. There is nothing to do but apply the emergency brakes. That is all that is possible to do with an air-brake train. We were using the improved, quick-action, automatic air brakes. * * * We don't reverse our engine, with the present appliances. That is played out." The fireman testified as follows in this connection: "Besides sounding the alarm whistle, the engineer applied the emergency. He did not reverse his engine. I don't think a skillful engineer would reverse his engine under such circumstances. The engines have appliances for reversing them. They can be reversed. You do not stop a train quicker by reversing the engine. It can be used in case your air refuses to work, but the air brake is put there purposely to stop the train with. In some cases when you reverse the engine it turns the wheels backwards, and in others it does not. If you make an application of your air and reverse your engine, and the train moving, any railroad man with any experience will tell you that it will lock the wheels, not only of the engine, but, the train being equipped with air brakes, will lock the wheels, and the whole train will slip. When the air brake is applied, it does not lock the wheels so as to make them slide. They continue to roll in the same direction. If the air is properly adjudged [?], it does not stop any of the wheels from rolling, but, if the engine is reversed, it stops all the wheels. If you reverse your engine and apply your brakes, it will lock the wheels in all instances, and it will slip. If you don't apply the

Same-Same-
Question for
Jury-Contribu-
tory Negligence-
Willfulness or
Wantonness.

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brakes, but reverse the engine, in some cases the wheels will slip then. I have known it to turn the wheels back. It does not come to a very short stop then. According to the best of my judgment, the shortest way to stop a train is to apply the air." It is, we take it, common knowledge that, in the absence of extraneous force, the driving wheels of an engine will turn to the front or to the rear as the lever is set forward or backward, and with equal force and power in either direction. If an engine in motion and drawing a train does not, on being reversed, turn its wheels backward, it is not because the whole force of the machine is not being fully exerted to the rear, but because the force of its own and the train's forward momentum is equal to or greater than the power of the engine; and, though the driving wheels in such case do not revolve backwards, the full power of the engine is spent against and in reduction of the momentum, through the bite they have upon the rails, being stationary, with the force of the steam holding them steadily to a backward motion, which they will visibly assume as soon as the momentum is reduced to a point where it will not overcome the bite of the drivers on the rails. Up to this point, if the drivers remain stationary (that is, do not revolve backwards), they must, of course, slide on and along the rails; and the power necessary to push the inert weight of the engine along the rails is taken from the power of the momentum, and goes, of course, to a reduction of the momentum, and thus helps to stop the train. If the drivers do revolve backwards, though the train continue to move forward, it is because the momentum overcomes the hold they have on the rails, and they slip; but so much of the force of momentum as is expended to overcome the hold of the drivers on the rails is a force exerted in reduction of the momentum, and to the stopping of the train. So, in any case, it would seem to be common knowledge that the reversing of an engine would operate directly and powerfully to overcome its and the cars' momentum, and to stop the train; and this whether the wheels of the cars be locked or not, or

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heavily clamped by brakes, though not locked, or not. At least, we may say, as of common knowledge, that as between a train with all the wheels of the cars and engine locked, and one with the wheels of the cars impeded by the brakes, but not locked, and the wheels of the engine revolving freely, the momentum of the former would be much more quickly overcome, and its speed much more readily reduced; or, in other words, that a train in motion will be sent further and faster on wheels which, though some of them are impeded by the brakes, continue to revolve, than on wheels all of which are locked and rigid. This is but another way of saying that a train can be rolled along its track easier and faster and further than it can be slid on its rails, and, if this were not so, we suppose railway companies would be quick to discard wheels and provide skates. The fireman, as we have seen, testified that the application of the air brakes impeded the wheels of the cars, but did not stop their revolutions, but that, if the engine was reversed at the same time, the effect was to lock all the wheels on the cars and on the engine, and sometimes even to cause the driving wheels of the engine to revolve backwards. On this testimony, taken in connection with the other testimony of this witness and the testimony of the engineer, set out above, it was at least a question for the jury whether the engineer was not guilty of negligence in failing to reverse his engine after he became aware of interstate's peril; and it may be that it could be declared by the court, as a matter of common knowledge, that the effect of reversing the engine of a train in motion is to impede its progress, overcome its momentum, reduce its speed, and bring it to a standstill. Certain it is that, in all our experience in dealing with hundreds of similar cases, it has never before been suggested that reversing the engine is not an approved and powerful means of stopping or reducing the speed of trains; and it is so recognized by the statute law of the state. Code, § 3440. We do not know whether this train could have been stopped, by reversing the engine, before it reached the crossing, or not. Probably not. But that its speed

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could have, by that additional means, been reduced further than it was by the application of the brakes, there was room for the jury to find; and, if it had been further reduced to the extent of delaying its approach to the crossing only a second or two, it is a fair conclusion from the evidence that the intestate would have escaped, since the proof is that she was in the very act of clearing the track on the other side from her entry, upon it when she was stricken. On this state of case the court properly refused to give the affirmative charge for defendant on the first count, and to give other charges to the effect that the negligence of the intestate was a defense to all the counts of the complaint except these charging willfulness or wantonness on the part of defendant's employees.

Count 5 of the original complaint was intended to charge that defendant's employees wantonly killed Mrs. Auther, plaintiffs' intestate. It was and is insisted for the defendant

Negligence—
Willfulness or
Wantonness—
Pleading—
Amendment—
Departure.

that it charged only negligence. We will assume that this contention of defendant was tenable, and that said count, did not charge wantonness or willfulness. This was the only

count in the original complaint in which any attempt to aver wantonness or willfulness was made, so that we are assuming that the original complaint counted on mere negligence only. Count 5 was afterwards amended, and as amended it was held to be a good count for wantonness by the trial court. And the sixth count was added by amendment, and that, confessedly, is a good count for wantonness or willfulness. Defendant objected to these amendments on the ground that they introduced an entirely new cause of action. It was said by JUSTICE COLEMAN in *Railroad Co. v. Markee*, 103 Ala. 160, 171, 15 South. 511, 514, that "a declaration or complaint may in one count aver simple negligence, in another willful and intentional wrong; * * * or if the complaint charged either the one or the other, and the proof was such as to require an amendment of the pleadings, this should be allowed"; or, in other words, that to a complaint charging simple negligence, only, a count may be

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added charging willfulness or wantonness, or *vice versa*. It is said that this was a dictum in that case, and should not be followed. Whether dictum or not, it is a sound statement of the law, and must be followed. An amendment, to be objectionable on the ground relied upon by appellant, must introduce an entirely new cause of action. An entirely new cause of action is not introduced by an amendment which counts upon the same transaction as that counted upon in the original complaint. It is on this principle that the common counts may be added to a complaint on a promissory note unless they are intended to bring forward a different and distinct obligation to pay. *Mahan v. Smitherman*, 71 Ala. 563. On the other hand, when the original complaint contains the common count on an account stated, and also claims the same amount as due by verified, itemized account, etc., and the verified account offered in evidence contains charges on account of these promissory notes made to plaintiff by defendant, a count on the notes may be added by amendment. *Oden v. Bonner*, 93 Ala. 393, 9 South. 409. So a declaration in trover may be amended by adding counts in case, the damages sought to be recovered under each count being for the loss to plaintiff of the same property. *Elmore v. Simon*, 67 Ala. 526. And a complaint on a written policy of insurance may be amended by adding a count on a verbal contract to insure it, etc.; both the alleged policy and the alleged verbal contract relating to the same risk. *Insurance Co. v. De Jarnett*, 111 Ala. 248, 19 South. 995. To a declaration in trespass against the sheriff and the sureties on his official bond, alleging a wrongful levy on plaintiff's property under color of office, an amendment may be added setting out the bond, and alleging its breach by the wrongfully levy. *Albright v. Mills*, 86 Ala. 324, 5 South. 591. So, to a declaration against a railroad company for personal injuries, alleging "that defendant's train threw a cow from the track and against plaintiff, whereby plaintiff was greatly injured," and that this was caused by the failure of the engineer to to blow the whistle or ring the bell at short intervals while

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running within the limits of a town, and his failure to use all means in his power to stop the train, an amendment may be added alleging that the train was running at a reckless and unusual rate of speed, and that the engineer failed to keep a lookout for obstructions on the track, whereby the injury was caused. *Railroad Co. v. Chapman*, 83 Ala. 453, 3 South. 813. And it has been held (though we do not intend to here fully indorse the ruling) that where, in an action for libel, the libel declared on in the original complaint relates only to plaintiff's solvency, an amendment may be allowed, under the statute, introducing another and distinct libel, written and published at a different time, and touching the integrity and personal conduct of the plaintiff, without questioning his solvency; this court, by BRICKELL, C. J., saying: "The amended complaint, by proper averments, introduces the libel given in evidence, purporting to have been written and published at a different time from the writing and publication of the libel described in the original complaint; and the matter of it concerns and touches the integrity and the conduct of the plaintiff, without assailing or questioning his solvency. In the leading case of *Crimm's Adm'r's v. Crawford*, 29 Ala. 626, construing the present statute of amendments, it was said: 'Under these statutes, we think there is no limit to the power of amending the allegations of a complaint, except that a party should not be allowed to depart in the complaint entirely from the process, or to substitute an entirely new cause of action, or to make an entire change of parties. Either of these things would be tantamount to the institution of a new suit, and would not be an amendment of the old cause of action.' This construction of the statute has since been observed, and, following it, the amended complaint, though introducing a libel different in substance, not of equivalent import or meaning with that averred in the original complaint, was properly allowed. The form of action is not changed. A cause of action entirely new is not introduced. A libel of the plaintiff, in his trade and business as a merchant, written and published before the

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commencement of suit, addressed to the same parties, is the cause of action averred in both complaints, the substance of the allegations is, however, changed. New matter is introduced, forming a new and independent cause of action, which was not before the subject of pending suit, and of contestation between the parties. The allegations of the complaint are not simply varied to meet the phases in which the evidence may present the matter already in issue, so that there will be a correspondence between allegations and proof; but a libel essentially distinct and different in all its parts and tendencies from that described in the original complaint is for the first time introduced by the amended complaint. While the cause of action remains a libel written and published of and concerning the plaintiff touching his character and credit as a merchant, there is a total departure from the subject of the libel as averred in the original complaint." *Mohr v. Lemle*, 69 Ala. 180. It has also been several times ruled by this court that, where the original complaint states no cause of action, an amended complaint stating a cause of action may be filed. *Simpson v. Railroad Co.*, 66 Ala. 85; *Railroad Co. v. Wood*, 105 Ala. 561, 17 South. 41. And, upon this ruling, it would seem that, other considerations aside, the counts for wantonness and willfulness were properly allowed because an attempt was made in the original fifth count to aver wantonness and willfulness. Where the original complaint is founded on the sheriff's official bond, and assigns as a breach the nonpayment of a decree rendered against him as administrator by virtue of his office, an amendment by adding a count on the decree only, without any reference to the bond, does not introduce a new cause of action. *Stringer v. Waters*, 63 Ala. 361. To a declaration on a note made by an executrix as such, a count may be added alleging an indebtedness of the testator in his lifetime, and thereupon the original count may be stricken. *Taylor v. Perry*, 48 Ala. 240; *Burch v. Taylor*, 32 Ala. 26.

These authorities serve to fully support the proposition with which we began this discussion, *viz.* that, so long as

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counts added by amendment set up the same general transactions or occurrences upon which the original complaint relied for recovery, they do not introduce an entirely new cause of action, and are not objectionable, though the form of action may be changed by them as from trover to case, or *vice versa*, or from case to trespass, etc.; and they further serve to differentiate the rule of amendments prescribed by the statute, as construed by this court, from the rule against departures in after pleading from the case made by the complaint. It is no objection to an amendment that it works a departure from the original complaint, within the meaning of the rule last referred to. The amendments under consideration in most of the cases referred to would have been vicious departures in pleading, if the facts they introduced had been replied to a plea to the original complaint,—as, for instance, where the original complaint was upon a note, and to a plea of *non est factum* the plaintiff had replied an *assumpsit* for work and labor, there would have been a clear departure from the original complaint, but it is undoubtedly the law that such *assumpsit* may be added by amendment to the complaint in a separate count. And so it is no argument against the right to add to a count for negligence counts for willfulness or wantonness, that willfulness or wantonness could not be replied to a plea of contributory negligence to a complaint charging negligence only. That the counts added in this case, intended to charge willfulness or wantonness, relate to the same occurrences in respect of which the original complaint charged negligence, is entirely clear upon the face of the several counts, and that they were properly allowed as amendments to the original complaint we have no sort of doubt.

The gist of the amended fifth count is that defendant's employees recklessly and wantonly ran the train, while approaching the crossing, at such a high rate of speed that they could not stop it, before reaching the crossing, after they had attained a point of view 200 yards away, from which they could see a person on the track at the crossing if a person were

Same—Same—
Same.

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there, and that the user of the crossing was such that it was probable some person would be on it at the time such point of view was reached by the trainmen. We do not think this count charges wantonness against the defendant's employees. Conceding (which is by no means clear) that it sufficiently avers the character of the crossing as being one where people passed in such numbers and with such frequency as that it was likely or probable persons would be on the track there and exposed to collision with passing trains, it is not averred that the trainmen were aware of this state of facts; and, without such knowledge on their part, willfulness or wantonness in respect of persons so exposed cannot be imputed to the defendant. Moreover, the trainmen were under no duty to stop the train or to check its speed upon seeing a person on the track, 200 yards away, at the crossing. The duty which the law does impose on them is to give signals of their approach, so that persons on the track at crossings will be warned and get off before the train reaches them, and the train operatives have a right to assume that they will get off until it becomes apparent that they will not. A general averment that defendant's employees wantonly or willfully ran the train against the intestate and killed her, without more (which is the averment of ~~Same—Same—Same.~~ the sixth count), is sufficient; but when to such general averment is added a statement of the facts, and these, while they may involve negligence, do not support the charge of wantonness or willfulness, the count is inadequate as one for wantonness and the like, and is bad as one for negligence, because of the inconsistency and repugnancy of its averments. *Railroad Co. v. Martin*, 117 Ala. 367, 23 South. 231. And surely, there being no duty on these trainmen to stop the train or to check its speed on seeing a person on the track at the crossing, 200 yards away, and no necessity ordinarily for them to do so, it cannot be said that they were either negligent or wanton in running the train at such a rate that they could not stop it or check its speed between

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this point of view and the crossing. The fifth amended count was bad, we conclude, and the demurrer to it should have been sustained. Moreover, its averments were not proved. There was no evidence tending to show that the train, at the speed it was running on this occasion, could not have been stopped before reaching the crossing, or its speed sufficiently checked to allow a person on the track at the crossing, when the train was 200 yards away, to escape injury; and for this the affirmative charge should have been given for defendant on this count. The affirmative charge asked by defendant on the sixth count, which does charge wantonness or intentional wrong, producing intestate's death, was properly refused. We are not prepared to say there was no evidence adduced in support of this count. Reversed and remanded.

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COWAN *et al.**(Circuit Court of Appeals, Fourth Circuit, May 1, 1900.)*

Directing Verdict.—It is the settled rule in the federal courts that when, on the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court.

Effect of Motion to Direct Verdict.—A motion to exclude plaintiff's testimony from the consideration of the jury, and to direct for defendant, like a demurrer to the evidence admits, not only what the testimony proves, but what it tends to prove.

Accident at Crossing—Negligence and Contributory Negligence Directing Verdict.*—Where it appears that but for the contributory negligence of a person injured by a train at a street crossing with which he was familiar in failing to properly observe the precautions

*See notes, 12 Am. & Eng. R. Cas., N. S., 366 *et seq.*; Central of Georgia Ry. Co. v. Forshee (Ala.), *ante*, p. 467.

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of stopping, looking, and listening, the accident would have been avoided, it is proper to direct for defendant, although it also appears that defendant was guilty of negligence in running the train to the crossing without giving the signals required by statute and at a rate of speed prohibited by an ordinance of the city, and in failing to have there gates and a watchman, as required by such ordinance.

ERROR by plaintiff to the circuit court of the United States for the district of West Virginia. *Affirmed.*

John A. Howard and J. B. Driggs, for plaintiff in error.
Henry M. Russell, for defendants in error.

Before GOFF and SIMONTON, Circuit Judges, and WADDILL, District Judge.

SIMONTON, Circuit Judge. This case comes up by writ of error to the circuit court of the United States for the district of West Virginia. The action was brought by the plaintiff, Frederick W. Neininger, against Case Stated. John K. Cowan and Oscar G. Murray, receivers of the Baltimore & Ohio Railroad Company. The cause of action is injuries received by the plaintiff in a collision with the railroad train of the defendants at a railroad crossing at the intersection of Main and Sixteenth streets, in the city of Wheeling, W. Va. The cause was heard in the circuit court with a jury. Only the testimony on the part of the plaintiff was taken. From this it appeared: That the plaintiff is by occupation a butcher, resident in the town of Bridgeport, Ohio. That he had frequent occasion to cross the bridge leading from Bridgeport to Wheeling, and to visit the latter city. The chief purpose of his visit was to purchase meat from the Swift Beef Company, which had a place of business close to the depot of the Baltimore & Ohio Railroad. His visits had been made chiefly in the daytime, towards the afternoon. Several times he had been there in the early morning, about 4 o'clock. On the morning of 23d April, 1896, a little before or about 5 o'clock, he crossed the bridge from Bridgeport, and drove into Wheeling, in a two-horse wagon, covered,

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with wooden sides. The driving seat was in front of the wagon, and outside of the sides, protected with curtains, which folded up, and which were so folded on this occasion. On the morning in question he entered Main street to the north of Sixteenth street, and the place of the crossing of the railroad track. His horses were trotting, and continued to trot until he got within about 50 or 60 feet of the railroad track, when he pulled his team down to a walk, and, without stopping, continued his course up to and upon the railroad track. Just as he got on the track the train of the defendants, which had left the depot a short distance from that point, going east, collided with his horses and wagon, killed one horse, injured another severely, smashed the wagon, threw him out on the pavement, and inflicted very serious injuries upon him, from which he has only partially recovered. The point of collision was the railroad crossing at the intersection of Main and Sixteenth streets. The plaintiff, in his wagon, approached this point, passing on the west side of Main street, between the curb of the pavement and the track of the Wheeling Street-Railway Company. The distance between this curb and this railway is 19 feet 4 inches. On this side of Main street, at the corner of Main and Sixteenth streets, there is a two-story brick building, and on Main street, next adjoining, are two other brick buildings, of two stories each. These prevent any one from seeing on the railroad track until he comes within 10 feet of the track, and from that point he can see about 64 feet on the railroad track. Had he gone on the east side of Main street, he could have had, from a point 18 or 20 feet from the railroad track, an unobstructed view of the track from every direction. The ordinances of Wheeling provided that this Baltimore & Ohio Railroad Company should erect and maintain in good order a gate at this crossing, properly managed by a watchman. It was further provided that, until gates should be erected and put in operation, no railroad company should run a train through the city at a greater speed than 4 miles an hour, and, after

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the gates were so put up and in operation, at a greater speed than 6 miles an hour. The railroad company had, some years before this accident, erected and maintained a gate at this point; but it had been removed more than a year before this, and no gate had thereafter been constructed. The testimony showed that the railroad company, in the daytime, had a man with a flag at this place to give warning of approaching trains, and plaintiff had seen this precaution taken. On the morning in question, which was just about daybreak, they had no such flagman stationed at that point. There is some confusion in the testimony as to the speed with which the train was moving. Some of the witnesses say at 15 miles an hour; some, as low down as 4 miles an hour. As soon as the accident occurred, the train was stopped, and when stopped it had passed the place of the accident the length of the locomotive and tender, and a large part of the baggage car. The plaintiff did not stop his wagon. He says that he listened for a train, and heard neither the bell nor whistle, nor the puffing of the engine, nor the noise of the train. Any sound which could come to him would be obstructed by the buildings on Main street, which were between him and the coming train. There is no evidence that any bell was rung or whistle sounded. One of the witnesses speaks of the puffing of the engine so loud as to induce the belief that they were going up a grade. The law of West Virginia requires a bell or steam whistle to be sounded by every locomotive at a distance of at least 60 rods from any place where the railroad crosses any public street or highway. At the close of the plaintiff's testimony, and after argument, the court constructed the jury to find for the defendant, because of the negligence of the plaintiff, which contributed to the injury. Thereupon plaintiff excepted, a writ of error was allowed, and the case in here on assignments of error as follows: Because the court erred in sustaining the motion of the defendants to exclude the plaintiff's testimony, and directing the jury to find a verdict for defendants; because the court erred in

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overruling plaintiffs motion to set aside the verdict and grant a new trial, and in rendering judgment for the defendants; because the court erred in holding that the plaintiff, on facts shown by the testimony set forth in the bill of exceptions, was guilty of contributory negligence. The first and third grounds of exception will be considered. The second assignment of error cannot be considered here. *Railway Co. v. Struble*, 109 U. S., at pages 384, 385, 3 Sup. Ct. 270, 27 L. Ed. 970.

The court instructed the jury to find for the defendant. This it was competent to do. "It is now the settled rule in the courts of the United States that when, on the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court. Such is the constant practice, and it is a convenient one. It saves time and expense. It gives scientific certainty to the law in its application to the facts, and promotes the ends of justice." *Bowditch v. Boston*, 101 U. S. 18, 25 L. Ed. 980; *Griggs v. Houston*, 104 U. S. 533, 26 L. Ed. 840; *Montclair v. Dana*, 107 U. S. 162, 2 Sup. Ct. 403, 27 L. Ed. 436. In *Elliott v. Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1070, it is held:

Directing Verdict.

"Though questions of negligence and contributory negligence are ordinarily questions of fact to be passed upon by a jury, yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury and direct a verdict."

See, also, *Mitchell v. Railroad Co.*, 146 U. S. 513, 13 Sup. Ct. 259, 36 L. Ed. 1064.

This ruling of the trial court is a ruling upon the law. It, in effect, holds, as a matter of law, that the party cannot recover. "The case should be left to the jury unless the conclusion follows, as a matter of law, that no recovery can

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be had upon any view which can be properly taken of the facts the evidence tends to establish." *Dunlap v. Railroad Co.*, 130 U. S. 649, 9 Sup. Ct. 647, 32 L. Ed. 1058. The motion made in the case at bar is the one now made, taking the place of a demurrer to the evidence. "In such a case," says the court in *Railroad Co. v. Woodson*, 134 U. S., at page 621, 10 Sup. Ct. 630, 33 L. Ed. 1035, "the practice of a demurrer to the evidence can be resorted to, or a motion to exclude the evidence from the jury, or to instruct them that plaintiff cannot recover, which motions are in the nature of demurrers to the evidence, though less technical, and have in many states superseded the ancient practice of a demurrer to the evidence." This being so, although the ruling of the court below depended largely upon its discretion (*Stewart v. Lansing*, 104 U. S. 511, 26 L. Ed. 866), yet it was such an exercise of discretion as is reviewable in this court,—a decision upon a question of law, which properly comes here on a writ of error. We must then inquire, was this discretion rightfully exercised in the case at bar? The ruling governing the court when this motion is presented is that stated in *Dunlap v. Railroad Co.*, *supra*:

"The case must be left to the jury unless the conclusion follows, as matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

Such a motion, like the demurrer to the evidence, admits, not only what the testimony proves, but what it tends to prove. The ultimate facts are admitted. *Railroad Co. v. Woodson*, 134 U. S. 621, 10 Sup. Ct. 628, 32 L. Ed. 1032. This being the law applicable to this case, was the court below in error in directing a verdict for defendant? There can be no doubt, from the testimony presented at the trial, that the defendants were guilty of negligence. The train approached a crossing of two important streets in the city, and gave no notice whatever of its

Effect of Motion
to Direct Verdict.

Accident at
Crossing—Negli-
gence and Con-
tributory Negli-
gence Directing
Verdict.

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coming. The witnesses heard no bell, and no whistle was sounded. No gates had been erected at the crossing, and no person was stationed at that place to give notice of a moving train. The defendants had neglected to observe the regulations prescribed both by an act of the legislature and by the ordinances of the city. So it must be assumed that at the time of the accident, and as one cause of the accident, there was negligence on the part of the defendants. But this does not decide the case. "The question in such cases" as this at bar "is (1) whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or (2) whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution that, but for such negligence or want of care and caution on his part, the misfortune would not have happened." *Railroad Co. v. Jones*, 95 U. S. 442, 24 L. Ed. 507; *Railway Co. v. Ives*, 144 U. S. 424, 12 Sup. Ct. 679, 36 L. Ed. 485.

The law is well settled by JUDGE SANBORN (MR. JUSTICE BREWER sitting with him and concurring) in *Railway v. Moseley*, 6 C. C. A. 643, 57 Fed. 922, 12 U. S. App. 601 :

"In order to maintain an action for negligence, when the injury was not wantonly, maliciously, or intentionally inflicted, it must appear that the negligence of the defendant was the proximate cause of the injury, and it must not appear that the negligence of the plaintiff contributed to that injury. When a diligent use of the senses by plaintiff would have avoided a known or apprehended danger, a failure to use them is, under ordinary circumstances, contributory negligence, and should so be declared by the trial court; and, when contributory negligence is established by the uncontroverted facts of the case, it is the duty of the trial court to instruct the jury that the plaintiff cannot recover."

Negligence is the failure to do what a reasonable and provident person would ordinarily have done under the circumstances. *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 406. That negligence is the proximate cause of an injury from which the injury might and ought to have been foreseen or

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reasonably anticipated under the circumstances as its probable result. It goes without saying that injury from engines or cars can be and ought to be foreseen or anticipated as the probable result of walking across or on a railroad track without looking both ways and listening for approaching engines. This is demonstrated by the fact that so universal is the experience that it has become a settled rule of law that such action is negligence. *Railway v. Moseley, supra*; *Elliott v. Railway*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068. The negligence of the servants of a railroad company in not sounding a whistle or ringing a bell does not excuse a person for not exercising ordinary care in crossing a track. *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542.

In the case before us the plaintiff was no stranger to the city of Wheeling. He was in the habit of going into it frequently, and was perfectly familiar with the place of the accident. He knew that the railroad track crossed at that place. He knew that the depot was a very short distance from it, and that trains left it for the East in the early morning. The track at the crossing in itself gave warning of danger. The absence of gates and the nonappearance of a flagman at that point gave significance to this warning. Entering Main street in his wagon, he trotted his horses towards the railroad crossing until he reached a point 50 or 60 feet from it. Then he slowed down to a walk, but kept going on. His plain duty, approaching that crossing, was to stop, look, and listen. Had he, instead of going on the west side of the street, gone on the opposite side, he could have looked upon the track, up and down, before he reached the crossing. Instead of this, he selected the other side, from which his opportunity of seeing was prevented by the buildings at the corner of the crossing, and his ability of hearing distinctly was diminished by the same cause. Under these circumstances, unable to see as well as to hear, it was all the more incumbent upon him to stop. This he did not do. Something must have prevented him from hearing the train. One of his witnesses, who was on that train, whose attention

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was not specially called to the fact, stated that as they were approaching the crossing the engine was giving that loud, puffing noise, indicating that it was going up grade. Plaintiff did not hear this,—whether from inattention, or because of the noise of his moving wagon, does not appear. He did not hear. All the more was it his duty to stop. Ordinary caution would have compelled him to stop. Had he done so before crossing the track, the accident could not have happened. He went on, got on the track, and was injured. He himself contributed to the injury. The judgment of the circuit court is affirmed.

WADDILL, District Judge, dissents.

McCULLEN

v.

CHICAGO & N. W. RY. CO.

(*Circuit Court of Appeals, Eighth Circuit, March 26, 1900.*)

Fires Set by Locomotives—Origin of Fire*—Question for Jury.—The facts and circumstances which the evidence tended to establish rendered it necessary for the court to take the opinion of the jury as to the origin of the fire, and would have warranted them in finding that it was kindled by a spark from one of defendant's locomotives.

Same—Presumption of Negligence.—A presumption of negligence on the part of the railroad company arises from the fact that sparks have issued from a passing locomotive of such size or in such volume as to kindle a fire and destroy adjacent property.

Same—Same—Question for Jury.—When plaintiff has offered evidence to raise such presumption of negligence on the part of the railroad, and the latter has offered direct proof that its locomotives

*See *Boston Excelsior Co. v. Bangor & A. R. Co.* (Me.), 16 Am. & Eng. R. Cas., N. S., 654, and *foot-note*; *Hoffman v. King* (N. Y.), 16 Am. & Eng. R. Cas., N. S., 764; *Southern Ry. Co. v. Myers* (Ga.), 16 Am. & Eng. R. Cas., N. S., 672.

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were provided with proper spark arresters, which were in good condition, and that they were properly handled on the day of the fire, the question whether such presumption is fully rebutted is for the jury, unless the rebutting evidence is so clear and circumstantial that no reasonable person could doubt its verity.

ERROR by plaintiff to the circuit court of the United States for the district of South Dakota. *Reversed.*

George C. Cooper, for plaintiff in error.

C. I. Crawford (A. W. Burt), for defendant in error.

Before CALDWELL, SANBORN, and THAYER. Circuit Judges.

THAYER, Circuit Judge. This action was brought by Maggie McCullen, the plaintiff in error, against the Chicago & Northwestern Railway Company, the defendant in error, to recover the value of a steam flouring mill located in the town of St. Lawrence, county of Case Stated.

Hand, state of South Dakota, which was destroyed, as she claimed, on December 2, 1895, by being set on fire by sparks that were negligently suffered to escape from one of the defendant company's locomotives, which was at the time in charge of its employees and was hauling one of its freight trains. The action was brought originally in a state court, but was removed to the federal court. After the case had been under consideration for about 31 hours by the jury which was impaneled to try the same, and the jurors had failed to agree upon a verdict, they were recalled and directed to return a verdict in favor of the defendant, upon which verdict, so returned by direction of the court, a judgment was subsequently entered. The plaintiff below excepted to such action on the part of the trial court, and brought the case here for review.

We are advised by the record, and also by the statements of counsel, that there had been three previous trials of the case upon substantially the same evidence which is contained in the present record, and that in each instance the jury had failed to agree. It has been repeatedly held since the decision

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in *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, that when the facts proven are such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of that issue is for the jury; and inasmuch as 48 men, who have at various times listened to the evidence in this case, have differed in opinion as to whether the defendant was or was not negligent, we would perhaps be justified in regarding that test as conclusive, and in remitting the case to the lower court to be retried. In view of the numerous trials that have taken place, we have thought it best, however, to consider the testimony attentively, and decide as to its sufficiency to sustain a verdict for the plaintiff, as it would have been our duty to do if the trial court, at the conclusion of the first trial, had of its own motion directed a verdict for the defendant.

The point at issue necessitates a statement somewhat in detail of the facts which were developed at the trial. The defendant's railroad track passes through the town of St. Lawrence from east to west. The plaintiff's mill that was destroyed was situated on the south side thereof, and 302 feet distant therefrom in a direct line. Between the mill and the track were an elevator, close to the track, which was 57 feet high, and on the south side thereof a lower wooden warehouse. The plaintiff's mill was three stories in height. A considerable space of vacant ground intervened between the buildings last described, and the territory south of the railroad track was generally open and unoccupied. On the roof of the mill, at its northeast corner, was a small ventilator which extended above the top of the roof a few feet. The four sides thereof consisted of thin wooden slats similar to those which are usually employed in constructing window blinds or shades. Directly underneath the ventilator on the third floor was a cyclone dust collector which, when in operation, blew some dust through the slats of the ventilator into the open air. The mill was closed down on Friday previous to the fire, which occurred about 10:30 a. m., on Monday, December 2, 1895, and there were no fires in or about

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The premises save in a small cannon stove which was located in a one-story office building at the northwest corner of the mill. This office building was not a part of the mill proper, but was connected therewith. In this stove there was a small fire on the morning of December 2, 1895, but the pipe leading therefrom extended above the roof of the mill, and such smoke as escaped from this pipe on that morning drifted in a direction which did not bring it within 20 feet of the ventilator heretofore mentioned. The wind was blowing from the north or from the northwest or from an intermediate point at a rate which was variously estimated by the witnesses at from 10 to 15 miles per hour. About 10:30 a. m. on the morning of the fire a freight train of the defendant company, containing about 30 cars and drawn by 2 engines, passed through the town of St. Lawrence from east to west without stopping. As this train moved through the town opposite to the mill, and for some distance west thereof, it was climbing an upgrade, and the engines were seen by several witnesses to emit considerable smoke, which was described by some of them as being dense and black. Shortly after the passage of the train, and within a period variously estimated at from 10 to 20 minutes, the mill was discovered to be on fire. Two witnesses located the fire when it was first seen as being on the slats on the outside of the ventilator heretofore described, and all agree that the fire was first observed from the outside on or around this ventilator. The plaintiff's husband testified, in substance, that on the first alarm of fire he stepped out of the small office building, and from that point saw a small blaze on the outside of the ventilator; that he entered the mill, and went immediately to the third story or floor, and found no fire on that floor on the inside of the mill underneath the ventilator, nor anywhere else, but that the fire at that time was wholly confined to the slats of the ventilator.

With respect to the issue whether the fire in question was occasioned by a spark from one of its locomotives, the defendant offered much expert testimony to the effect that a spark

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could not have been emitted by either of its locomotives, and carried a distance of 302 feet from its track, which would have retained sufficient vitality to have set fire to the slats of the ventilator under the conditions which existed at the time the fire took place. On the other hand, a railroad engineer who was called by the plaintiff testified, in substance, that under such conditions as prevailed on the day of the fire,—with the wind from the north, blowing about 10 miles an hour, and the train moving on an upgrade,—a spark might have been carried 302 feet, and might have set fire to such slats as were in the ventilator, although the ventilator was at a height of 35 feet above the ground, provided the spark arrester of either engine was at the time in a defective condition. Another witness, who met the train in question on the day of the fire a few miles east of the town of St. Lawrence, also testified that the leading or head locomotive was then emitting large sparks, which floated 264 feet from the track, as ascertained by a subsequent measurement. Another witness testified, in substance, that he had, on one occasion previous to the fire, seen sparks emitted by locomotives which were in use by the defendant company that rose to a considerable height, and floated as much as 600 feet from the track, before they expired.

It is hardly necessary to observe that it is not the province of this court to say in which way the issue as to the origin of the fire ought to have been determined. Our sole function is to decide whether, in view of all the testimony, reasonable men, listening to the evidence as it was adduced, might have concluded that the fire was occasioned by a spark from one of the locomotives; and this question must be determined under and subject to the rule that it is the special province of a jury to determine to what extent witnesses are credible, and how far, if at all, their evidence is trustworthy, or is influenced by prejudice, self-interest, or other causes. We have reached the conclusion that there was substantial testimony enough, as we think, to sustain a finding that the mill was

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set on fire by a spark from one of the defendant's locomotives, provided the jury credited the statements of the plaintiff's witnesses. The considerations which lead us to hold that such a conclusion might have been formed by reasonable men are the following: First, the near relation in point of time between the passage of the defendant's train and the outbreak of the fire; second, the evidence tending to show that the fire caught on the outside of the ventilator, in the slats; third, the positive testimony of one witness that, when it was so discovered, there was no fire on the inside of the mill, underneath the ventilator; fourth, the direction and strength of the wind, which would naturally carry the sparks to the mill; fifth, the testimony tending to show that, as the train passed through the town of St. Lawrence, one or both of the locomotives were emitting volumes of smoke, and were laboring to some extent on an upgrade; sixth, the testimony that the same locomotives were emitting sparks of considerable size, which floated for some distance, when they were only a few miles distant from the town of St. Lawrence on the day of the fire; seventh, the evidence which tended to show that it was by no means impossible for sparks issuing from a locomotive to be carried as far as 302 feet; and, lastly, the lack of evidence as to any other adequate cause for the fire, if the testimony of the plaintiff's witnesses is credible. These facts and circumstances, which the evidence tended to establish, rendered it necessary, in our judgment, to take the opinion of the jury as to the origin of the fire, and would have warranted them in finding that it was kindled by a spark from one of the locomotives.

It is contended, however, by counsel for the railroad company, that even if it be true that there was substantial testimony which tended to show that the fire was occasioned by sparks which were emitted by the passing locomotives, and that even if the jury had so found, yet the fact so established would not have created a presumption that the defendant company or its employees were in any respect negligent. On this ground it is urged

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that the case was properly withdrawn from the jury, inasmuch as the defendant offered considerable testimony which tended to show that its engines were properly handled, and were provided with spark arresters, which were in a good state of repair on the day of the fire; whereas, the plaintiff produced no direct evidence to the contrary. It is true that there are some cases which hold that the mere fact that sparks have escaped from a locomotive and set fire to adjoining property creates no presumption of negligence on the part of the railway company, either in constructing or handling its locomotive; but the weight of judicial opinion is the other way, and it is now comparatively well settled that a presumption of negligence does arise from the fact that sparks have issued from a passing locomotive of such size or in such volume as to kindle a fire and destroy adjacent property. This doctrine is supported by the consideration that it is the duty of railroad companies, in constructing their locomotive engines, to adopt suitable appliances and safeguards, such as experience has shown will best serve to prevent them from emitting sparks and destroying property, and by the further consideration that such companies or their employees either know or should know whether such a degree of care has been exercised, and what appliances, if any, are actually in use on its engines, and whether they are in a good state of repair; whereas, third persons whose property is destroyed have no such knowledge or means of knowledge, and as a rule can neither prove nor disprove the aforesaid facts without great inconvenience and expense. These reasons have led most courts to hold,—and the doctrine, as we think, should be adhered to,—that proof that property has been destroyed by sparks emitted by a passing locomotive creates a presumption that, through a want of proper care on the part of the owner thereof or its employees, the locomotive in question was not provided with a proper spark arrester, or that it was not at the time in a good state of repair, or that its locomotive was carelessly handled. *Spaulding v. Railway Co.*, 30 Wis. 110, 121; *Ellis v. Railroad Co.*, 24 N. C. 138,

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141; *Burke v. Railroad Co.*, 7 Heisk. 451, 462; *Railroad Co. v. Reese*, 85 Ala. 497, 5 South. 283; *Railway Co. v. Horne* (Tex. Sup.), 9 S. W. 440; *Coates v. Railway Co.*, 61 Mo. 38; *Railroad Co. v. Stanford*, 12 Kan. 279; *Railway Co. v. Campbell*, 86 Ill. 443. See, also, *Burroughs v. Railroad Co.*, 38 Am. Dec. 71, and cases cited in the note; *Eddy v. Lafayette*, 4 U. S. App. 247, 256, 1 C. C. A. 441, 49 Fed. 807, 812; *Frankford & Bristol Turnpike Co. v. Philadelphia & T. R. Co.*, 54 Pa. St. 350; *Steinweg v. Railway*, 43 N. Y. 123; *Gibson v. Railway Co.*, 1 Fost. & F. 23; *Greenfield v. Railway Co.*, 83 Iowa 270, 49 N. W. 95; *Dean v. Railway Co.*, 39 Minn. 413, 40 N. W. 270; *Karsen v. Railway Co.*, 29 Minn. 12, 11 N. W. 122.

It is urged, finally, by the defendant company, that even if its last position is untenable, and if it be conceded that the evidence was sufficient to raise against it a presumption of negligence, yet, as it offered direct proof that its locomotives were provided with proper spark arresters, which were in good condition, and that they were properly handled on the morning of the fire, it thereby fully rebutted the presumption of negligence which the plaintiff's proof had raised, and that on the latter ground the verdict below should be sustained. We cannot assent to that view of the case. When the plaintiff offered evidence which was sufficient to raise a presumption of negligence, it was the province of the jury to decide whether the defendant's rebutting proof was adequate to overcome that presumption. As was said, in substance, by the supreme court of Minnesota, in *Karsen v. Railway Co.*, *supra*, a jury is not necessarily bound to accept as conclusive the statement of a witness that an engine was in good order, or carefully and skillfully operated, although there is no direct evidence contradicting the statement. They have a right to consider all the evidence and circumstances bearing upon the condition and mode of operating the engine, as well as the circumstances under which the fire took place. Moreover, if the jury were satisfied, and so found, that the mill

Same-Same-
Question for
Jury.

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was ignited by a spark which came from one of the defendant's locomotives, it may well be that this fact alone would have led them to discredit the statements of the defendant's witnesses concerning the condition of the locomotives and how they were handled, and the right of the jury to discredit them for that reason cannot be denied. *Greenfield v. Railway Co.*, 83 Iowa 270, 276, 49 N. W. 95. We are of opinion that the correct view is that, when the evidence which is offered by a plaintiff to make out his cause of action creates a presumption of negligence, the case should be submitted to the jury, unless the rebutting evidence is so clear and circumstantial that no reasonable person could doubt its verity. We are not prepared to hold that the presumption of negligence in the case at bar was rebutted by the kind of proof last described, and, not being able to so decide, the case should have gone to the jury. It is accordingly ordered that the judgment below be reversed, and the cause remanded for a new trial.

LOUISVILLE & N. R. CO.

v.

MARBURY LUMBER CO.

(Supreme Court of Alabama, Jan. 17, 1900.)

Negligence—Pleading—Legal Conclusions.—None of the counts of the complaint were subject to the objection that its allegation of negligence set forth nothing but a legal conclusion; and all of such counts were sufficient.

Fires Set by Locomotives—Presumption of Negligence—Rebuttal—Question of Law.*—Where there is merely a presumption of negligence against a railroad company, arising from the fact of the communication of fire by its railroad engine, and defendant's evidence shows that its appliances for the prevention of such accidents were of proper pattern and construction, and in good repair; and that

*See *McCullen v. Chicago & N. W. Ry. Co.* (C. C. A.), *ante* and *foot-note*.

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there was no negligence in the operation of the engine, it is the duty of the court to hold, as matter of law, that such presumption of negligence is overcome.

Same—Negligence—Evidence—Distance from Track.—The mere fact that cotton set on fire by sparks from a passing engine was 50 feet from the center of the track did not tend in the remotest degree to establish negligence on the part of the railroad.

Same—Same—Same—Speed.—In the absence of a statute regulating the speed of trains, the mere fact that the engine which emitted the sparks starting such a fire was going at rapid speed did not tend to establish negligence on the part of the railroad.

Same—Contributory Negligence.—The fact that cotton on plaintiff's premises was exposed to the reach of sparks from passing locomotives is no defense in an action against the railroad for its destruction by a fire started by sparks from a locomotive, through defendant's negligence.

APPEAL by defendant from Autauga county circuit court.
Reversed.

The three counts of the complaint were as follows: “(1) Plaintiff claims of defendant the sum of twenty-five hundred dollars [\$2,500) as damages, for that heretofore, to wit, the 13th day of January, 1897, the defendant negligently set fire to and destroyed, to wit, seventy bales of cotton, the property of the plaintiff, located on the premises of the plaintiff, of the value, to wit, twenty-five hundred dollars (\$2,500), to plaintiff's great damage as aforesaid. (2) The plaintiff claims of the defendant the further sum of twenty-five hundred dollars (\$2,500) for that heretofore, to wit, on the 13th day of January, 1897, the defendant negligently set fire to and destroyed, to wit, seventy (70) bales of cotton, the property of the plaintiff, of the value of, to wit, twenty-five hundred dollars, to plaintiff's great damage as aforesaid. (3) The plaintiff claims of defendant the further sum of twenty-five hundred dollars (\$2,500) as damages, for that heretofore, on, to wit, 13th day of January, 1897, the defendant, by the negligence of its agents and servants who were then and there engaged in the operation of a train of cars and engine upon defendant's railway track at Bozeman, Alabama, negligently threw from said engine sparks which set fire to cotton, the

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property of plaintiff, of the value, to wit, twenty-five hundred dollars (\$2,500), and by means thereof destroyed, to wit, seventy (70) bales of cotton, to the plaintiff's damage in the sum aforesaid." Defendant demurred to the first and second counts of the complaint upon the following grounds: "(1) Said counts fail to show wherein the alleged negligence consisted. (2) Said counts merely state the conclusion of the pleader. (3) No facts are shown which constitute negligence." To the third count the defendant demurred upon the following grounds: "(1) Said count states the conclusion of the pleader. (2) Because it is not shown how or in what manner the agents or servants of the defendant were guilty of negligence in the premises. (3) Because it is not averred or shown that the engine or cars were negligently handled." The court instructed the jury as follows: "If you find that the cotton was burned on account of the negligent act of the defendant, then your verdict should be for the plaintiff." The defendant duly excepted to the giving of this portion of the court's general charge, and also separately excepted to the court's refusal to give, among others, the following written charges requested by it: "(1) If the jury believe the evidence, they must find for the defendant. (2) The court charges the jury that it was negligence for the plaintiff to pile the cotton near the track of the defendant, as shown by the testimony in this case. (3) The court charges the jury that if they believe from the evidence that the cotton was piled in a pen without any covering of any kind, and without any watchman, then this was contributory negligence on the part of the plaintiff, which will defeat a recovery, and they must find for the defendant." "(7) The court charges the jury that the fact that the cotton was fired by sparks from defendant's engine does not, under the circumstances of this case, raise any presumption of negligence on the part of the defendant. (8) The court charges the jury that evidence which merely tends to show that the fire originated from sparks from the engine is not of itself sufficient to shift the burden of proof upon the defendant to show that its ap-

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pliances for the escape of sparks and the manner of its train was free from negligence. (9) It being a matter of common knowledge that cotton is one of the most inflammable materials known, required an ordinary degree of caution and diligence on the part of the plaintiff; and plaintiff having failed in this, by reason of no protection, such as a covering or guard, being provided, or acting in the premises as an ordinarily prudent man would act under the circumstances, then this would prevent a recovery by the plaintiff. (10) If the jury believe from the evidence that the plaintiff was guilty of such negligence in piling the cotton in the manner proved, and allowing it to remain there the length of time it did, then this would be such negligence on the part of the plaintiff as would defeat its right of recovery." "(12) The court charges the jury that, even if the evidence tends to show that the fire caught from sparks from an engine, yet the jury cannot infer that the sparks were negligently emitted, and, unless they find from the evidence that the sparks escaped from engine 294 in dangerous and unusual quantities, then they must find for the defendant." "(16) The court charges the jury that it is a matter of common knowledge that sparks from locomotives, no matter how well constructed, or in what condition, or how carefully handled, escape in more or less quantities; and, while such evidence may tend to show that the fire was caused by such sparks, it does not show that they were not emitted in the ordinary, natural operation of the engine."

Thos. G. Jones, Chas. P. Jones, and A. C. Birch, for appellant.

Watts, Troy & Coffey, for appellee.

TYSON, J. The complaint contains three counts. Counts 1 and 2 are substantially the same. They are no more than legal conclusions. Not a single fact is alleged in either out of which any duty arose or was owing on the part of the defendant to the plaintiff, nor in what the breach of duty consisted upon which the plaintiff predicates the defendant's

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negligence. It would be difficult to frame a count more general, and containing less information to the defendant as to what it is required to defend against, than these. As to whether the plaintiff complains of the defendant for the negligent destruction of its cotton while the cotton was *in transitu*, in the warehouse of the defendant, upon the platform of defendant's station house, on the right of way of the defendant, or on the premises of the plaintiff, count No. 2 does not inform us. Furthermore, by what means or through what agency the fire was communicated to plaintiff's cotton is also a matter of conjecture. Whether by sparks emitted from a passing engine, which directly set fire to the cotton, or to some inflammable substance upon the defendant's right of way, and thereby communicated to the cotton, or whether by carelessness of some one in charge of the station the house or platform of the defendant was destroyed by fire, which burned the cotton, or by the carelessness of some agent or servant of defendant in the handling of a lighted lamp, candle, match, or torch he communicated the fire to the cotton, we are not informed, as we have said, by either of these counts. It requires no argument to show that the defendant would be at a serious disadvantage if required to take issue upon a complaint couched in such broad language as that affords it no information whatever as to the act of nonfeasance or misfeasance complained of. If the fire was communicated to the cotton in either of the ways suggested, and of which the plaintiff would have the right to make proof if issue was taken upon the counts, the character of the evidence required of the defendant to rebut the contention would be materially and entirely different. Should plaintiff rely upon a destruction of the cotton by means of sparks from a passing engine, the question of the proper construction or handling of the engine would be the issue. Should it rely upon the destruction of the cotton by the careless handling of a lighted lamp, candle, match, or torch by the agent or servant of the defendant, the issue would be radically different. The pleadings must be as brief as is consistent with perspicuity

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and the presentation of the facts or matter to be put in issue, in an intelligible form. No objection can be allowed for defect of form, if facts are so presented that a material issue in law or fact can be taken by the adverse party. Code, § 3285. In *Phoenix Ins. Co. v. Moog*, 78 Ala. 301, this court said: "Precisely the same principle applies to averments of negligence, whether urged by way of defense or in maintenance of an action. It is not sufficient to aver mere conclusions of law. The facts must be averred from which the conclusion of negligence is deducible." After quoting this rule, *Justice Clopton*, in *Railway Co. v. Chewning*, 93 Ala. 26, 9 South. 459, said: "This rule has been relaxed from necessity in cases where the cause of action consists in the nonperformance or misperformance of duty. In such cases the rule has been thus stated: 'When the gravamen of the action is the alleged nonfeasance or misfeasance of another, as a general rule it is sufficient if the complaint avers facts out of which the duty to act springs, and the defendant negligently failed to do and perform, etc.; and it is not necessary to define the *quo modo*, or to specify the particular acts of diligence he should have employed in the performance of such duty.' The reason given is, 'what the defendant did, and how he did it, and what he failed to do, are generally better known to the defendant than to the plaintiff, and hence it is that in such cases a general form of averment is sufficient.' " This rule is announced and recognized as the proper one by this court in *Railroad Co. v. George*, 94 Ala. 214, 10 South. 145; *Improvement Co. v. Campbell*, 25 South. 793; *Armstrong v. Montgomery St. Ry. Co.* (Ala.; MS.) 26 South. 349; and others. In each of these cases, however, there was a general averment of fact constituting the nonperformance or misperformance of duty out of which the negligence of the defendant arose, as well as the facts out of which the duty to act sprung. Courts of other jurisdictions recognize and enforce this rule, and it is stated generally to be that the complaint or declaration in an action for negligence should

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allege a duty owing the plaintiff by the defendant, or state the facts from which the law will imply the duty, and the plaintiff need not set out in detail the specific acts constituting the negligence complained of, as this would be pleading the evidence. 14 Enc. Pl. & Prac. 331, 333. In the well-considered case of *Snyder v. Electrical Co.*, 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, the supreme court of West Virginia interprets and applies the rule under consideration. It is there said: "One error alleged is the action of the circuit court in overruling a demurrer to the declaration. The specification of its defect is that it ought to, but does not, set forth the duty and aver the neglect." And citation is made of the language in the opinion of *Clark v. Railroad Co.*, 39 W. Va. 732, 20 S. E. 696, that a declaration in "tort must have requisite definiteness to inform the defendant of the nature of the cause of action, and the particular act or omission constituting the tort"; and reference is made to *Poling v. Railroad Co.*, 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215, holding that a declaration for negligence "is good if it contain the substantial elements of a cause of action, the duty violated, the breach thereof properly averred, with such matters as are necessary to render the cause of action intelligible, so that judgment according to law and the very right of the case can be given." I think these statements are good law. Hogg, Pl. & Forms, § 140, says that: "It is settled, as a general rule, that it is not necessary to state the particular acts which constitute negligence. This is so, but we must take care not to misapply this statement. The West Virginia cases cited to sustain the rule are cases against railroads for killing stock. If a declaration allege that a railroad killed stock by negligently running over it, as in those cases, that would be sufficient, without more details of the circumstances of running over it; but I take it that it would not be enough simply to say that the company negligently killed a horse. You must aver the duty, and aver the existence or presence of negligence in its performance, and specify the act working

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damage, but need not detail all the evidential facts of negligence. You must tell the defendant, even under this general rule, that he negligently did a specific act doing harm. In other words, you may say that the defendant negligently did or did not do so and so, without detail as to the mere negligence, but you must state the acts that are the basis of his liability. * * * The object of a declaration is to give the facts constituting the cause of action, so they may be understood by the party who is to answer them, and by the jury and court who are to give verdict and judgment on them; and though, in an action for negligence, it is not necessary to state with particularity the acts of omission or commission, yet, lest too loose a practice shall grow under this rule, it may be well to state * * * that this rule does not justify a general and indefinite mode of declaring, admitting of almost any proof. * * * To avoid misunderstanding, it is important to add that the declaration need not state the particular facts that are not primary or main facts, but only are evidence of primary facts. When the primary facts are given, then all other facts merely incidental that go to prove the primary facts may be proven without specification in the declaration." The requisites of a good declaration in actions for negligence are well stated by WILKS, J., in *Gautret v. Egerton*, L. R. 2 C. P. 371, 374. "It ought," he says, "to state the facts upon which the supposed duty is founded, and the duty to the plaintiff, with the breach of which the defendant is charged. It is not enough to show that the defendant has been guilty of negligence, and how he became bound to use care to prevent injury to others." "Such a duty arises out of some relation existing at the time between the person injured and the defendant, which the complaint, by the averment of facts, should show." *Thiele v. McManus*, 3 Ind. App. 132, 28 N. E. 327. See, also, a statement and application of this doctrine in *Smith v. Tripp*, 13 R. I. 152; *Kennedy v. Morgan*, 57 Vt. 46; *Railway Co. v. Stark*, 38 Mich. 714; *City of Buffalo v. Holloway*, 7 N. Y. 493; *Splittorf v. State*, 108

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N. Y. 205, 15 N. E. 322; *Sweeny v. Railroad Co.*, 10 Allen 368; *Angus v. Lee*, 40 Ill. App. 304; and *Seymour v. Maddox*, 71 E. C. L. 326. In *Metcalf v. Hetherington*, 11 Exch. 257, it is said: "A declaration which charges a breach of duty must contain an allegation from which the duty can be inferred; otherwise, the declaration is bad." *Dutton v. Powles*, 2 Best & S. 174, 31 Law J. Q. B. 191; *Cane v. Chapman*, 5 Adol. & E. 647; *Hurdman v. Railway Co.*, 3 C. P. Div. 168; form of complaint in actions against railroad companies for negligence in using and managing locomotives, found on page 351 of *Heard's Civil Precedents*.

Count No. 3 differs in substance only from counts 1 and 2 in the averment "the defendant, by the negligence of its agents and servants, who were then and there engaged in the operation of a train of cars and engine upon defendant's railway at Bozeman, Alabama, negligently threw from said engine sparks, which set fire to cotton," etc. Here, again, not a single fact is averred out of which the duty to act arose, and it is as defective in this respect as counts 1 and 2. At best, what duty was due to the plaintiff by the defendant in the performance of the act by its agents or servants, in throwing from the engine sparks, lies in mere inference, argument, or deduction. It is certainly not averred. "Facts, and not mere inferences, arguments, or deductions, are required to be alleged in pleadings." *Meadows v. Meadows*, 73 Ala. 356.

In my opinion, the counts are bad, and the demurrer to each of them should have been sustained. A majority of the court, however, do not agree with me, but hold the counts are sufficient. To my mind, this holding not only emasculates the statute (section 3285), but contravenes all rules of good pleading, as well as many well-considered opinions in other cases delivered by this court, where negligence is the gravamen of the action. *Railroad Co. v. Lamb* (Ala.), 26 South. 969.

The testimony offered by the plaintiff tended to show that 66 bales of cotton belonging to it, of the value of \$2,200,

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located on its premises, 50 feet and 2 inches from the center of the defendant's track, were destroyed by fire originated by sparks emitted from passing engine No. 294, attached to freight cars. It was shown that there was no fire at the time in any of the buildings adjacent to the cotton from which a spark would probably have fallen; that the wind was blowing from the track, in the direction of the cotton, at the time the train passed; that the train did not stop at the station, but ran by at a rapid rate of speed; and that the locomotive was emitting a great many sparks. The witnesses for the plaintiff say that the only thing they noticed, unusual, about the engine or the train, was the rapid speed at which it was traveling when it passed. The evidence shows, also, that the train at this point was going up grade, and that an engine emits more sparks in climbing a grade than when running upon a level track, on account of the exhaust being greater. The evidence introduced by the defendant established without dispute that the train was a light one, and was managed by skillful persons in a proper manner; that the locomotive was equipped with the latest practical improved appliances to prevent, as far as possible, the emission of sparks, and was in good repair and condition; that the appliances upon this engine were such as are used by other well-regulated roads; that no appliance or equipment would prevent the escape of sparks; that the appliance upon this engine was a wire netting, with apertures in it to allow the exhaust to pass through; that, if the apertures were smaller than those in use upon this engine, it would cause it to choke, and when this occurred the engine would not produce steam; that when the train passed Bozeman station, where the cotton was destroyed, the engine was emitting no more than the usual amount of sparks, and the quantity of sparks escaping depends upon the exhaust,—when great, the sparks would fly further and higher.

The first question presented is the one involving the burden of proof, and the extent of its operation. As to the

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burden, whether on the plaintiff to show some fact establishing negligence on the part of the defendant in the operation or equipment of its engine, or whether upon the defendant to prove due care in its handling and equipment after proof by plaintiff of the origin of the fire from sparks emitted by it, the courts are at variance. It seems, however, that in this state the rule is that the mere communication of fire by a railroad engine is of itself sufficient to raise a presumption of negligence against the company. It has its foundation in the practical necessities of the case. Its locomotives from which the fire escapes are entirely within the control and under the supervision of the company, and its agents or servants know whether or not they are properly equipped to prevent the escaping of fire, and they know whether any mechanical appliances were employed for that purpose, and, if so, what was their character, while, on the other hand, the owner of the property consumed has little or no opportunity to learn whether it was a case of unavoidable accident or negligence. Such facts may be easily ascertained and proved by the company; and if its appliances are of proper pattern and construction and in good repair, and there has been no negligence in the operation of the engine, the presumption of negligence arising from the escape of fire can be rebutted. Care should, however, be observed, to distinguish between the *prima facie* presumption of negligence raised against the company upon proof of communication of fire from sparks from an engine, merely for the purpose of shifting the burden of proof, and *prima facie* evidence of negligence in fact, lest the rule be misapplied, and the presumption indulged to an extent of making out the plaintiff's case as against the undisputed evidence of the exercise of due care in the handling and the proper construction of the engine. The extent of the rule is, as said by JUSTICE CLOPTON in *Railroad Co. v. Reese*, 85 Ala. 502, 5 South. 284: "We do not understand that, in actions for injuries caused by negligent escape of fire from a railroad engine, it operates or is intended to

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abrogate or modify the general rule which makes it incumbent on the plaintiff, in the first instance, to establish a *prima facie* case, or to devolve on the defendant the burden of doing more than disproving the *prima facie* case shown by the plaintiff. Railroad companies, being authorized to employ the powerful and dangerous agency of steam, are required by law to use due and reasonable care to prevent injury to the property of others,—as has often been said, a high degree of care. Reasonable care, however, does not require the adoption of every new invention or contrivance which science may or can suggest, as to the utility of which men equally skilled may differ. They fulfill the measure of their duty in this respect by adopting such appliances and contrivances as are in practical use by well-regulated railroad companies, and which have been proved by experience to be adapted to the purpose. When they have discharged this duty they are not liable for accidental injuries caused by the escape of fire from their engines. The mere fact that a fire originated from sparks emitted from an engine is not sufficient to fasten a liability on the company, neither does the rule so operate. It is not a rule of liability, but of evidence. On the advanced progress in mechanical appliances, and the practical demonstration of their utility and efficiency, a reasonable inference may arise, when fire originates from sparks emitted by a locomotive in sufficient quantity or volume to occasion damage, that the engine is not properly constructed, or that it has not the improved appliances, or is not managed with care. When the inference is repelled by proof of the proper construction of the engine, and use of the proper appliances, and careful management, the plaintiff cannot maintain the action without making proof of other negligence or want of care." This principle is stated in 13 Am. & Eng. Enc. Law (2d Ed.) 504, and supported by the authorities cited in the notes, to be: "The general rule on this subject is that if the defendant shows that the engine alleged to have caused the fire was of proper construction, and equipped with approved devices

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and appliances to prevent the escape of fire and sparks, was in good repair, and prudently managed and controlled, the *prima facie* presumption arising from the mere communication of fire will be rebutted." And, as to whether the presumption is rebutted is for the court or jury, the rule seems to be "that where there is no evidence, direct or inferential, of actual negligence, then, if proper evidence of due care in all respects is presented by the defendant, the case will be one for the court, in the sense that the mere presumption will not be given the effect of evidence, so that a conflict of evidence for the jury is presented." *Id.* 507. And this statement of the rule is recognized and announced in the quotation above from Railroad Co. v. Reese. In Spaulding v. Railway Co., 33 Wis. 591, it is said: "But the learned counsel for the plaintiff very ingeniously argued that the presumption that the defendant's locomotives were not properly constructed and equipped has the force and effect of testimony in the case, and that the question whether the testimony introduced for the purpose of overcoming such presumption is sufficient for that purpose is necessarily a question of fact to be determined by the jury. The argument would probably be a sound one, were this a presumption of fact. Its weight and force, and consequently the amount of proof essential to overcome it, would in such case be for the jury, and not for the court, to determine. But the presumption under consideration is clearly one of law, and is governed by an entirely different rule. Its weight and effect, and the amount and character of the proof necessary to overcome it, are questions for the court, and were determined by this court on the former appeal. In such cases, if there is a conflict of testimony, the jury must determine what facts are proved; but where, as in this case, there is no such conflict, and the testimony is clear and satisfactory against the presumption, it is the duty of the court to hold, as matter of law, that the presumption is overcome. If, instead of doing so, the court leaves it to the jury to determine the fact, it is error which will work a reversal of the judgment." Again, the same court said in Spaulding v.

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Railway Co., 30 Wis. 122, 123: "The presumption, therefore, of negligence or of the want of proper equipments, arising from the mere fact of fire having escaped, is not conclusive, nor, indeed, a very strong one, but, of the two, rather weak and unsatisfactory. It is indulged in merely for the purpose of putting the company to proof, and compelling it to explain and show, with a reasonable and fair degree of certainty, not by the highest and most clear and unmistakable kind of evidence, that it had performed its duty in this particular." This case was cited approvingly in *Railroad Co. v. Reese*, *supra*. Wood, R. R. pp. 1576, 1577, and note 1; Shear. & R. Neg. (5th Ed.) 676, and note 12; *McCaig v. Railroad Co.*, 8 Hun 599; *Menominee River Sash & Door Co. v. Milwaukee & N. R. Co.*, 91 Wis. 459, 65 N. W. 176. In kindred cases, involving the presumption of negligence for killing stock, where the burden of proof is cast upon the railroad company by the statute, this same principle has been frequently recognized and enforced by this court. Code, § 3442; *Railroad Co. v. Moody*, 90 Ala. 46, 8 South. 57; *Railroad Co. v. Hembree*, 85 Ala. 481, 5 South. 173; *Railroad Co. v. Smith*, 85 Ala. 208, 3 South. 795; *Railroad Co. v. McAlpine*, 75 Ala. 113, 121; *Anderson v. Railroad Co.*, 109 Ala. 129, 19 South. 519. Applying these principles to the facts as disclosed by the record in this case, conceding that the evidence introduced by the plaintiff tends to establish that the fire originated from sparks emitted from the engine of defendant, it must be held, as a matter of law, that the presumption indulged is rebutted, and the defendant entitled to have the affirmative charge requested by it to be given.

It may be, and doubtless will be, said that the cotton destroyed was 50 feet from the center of the track, making it practically the same distance from the passing engine, and that this fact affords some evidence of actual negligence, either in the construction or equipment of the engine or its handling. In the absence of evidence as to what distance a properly equipped and skillfully managed engine, under similar atmospheric con-

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ditions, would throw sparks, it is obvious that in order for the jury to conclude, from the fact that the cotton was located 50 feet away from the track when destroyed, there is evidence of negligence, they must indulge a presumption of negligence, or base their conclusion upon their own judgment, experience, or knowledge. Confessedly, the defendant is not answerable in damages for the reasonable exercise of a right. Being authorized by law to operate its locomotive engines by steam, which of necessity must be generated by the use of fire, and it being impossible to construct them so as to be successfully operated without emitting sparks or burning cinders, its liability arises only when it is shown that this right was exercised negligently or maliciously. Courts cannot presume the wrongful or negligent exercise by it of the lawful right, but affirmative proof of some fact tending to establish the wrongful or negligent exercise of it by the defendant must be adduced. 8 Am. & Eng. Enc. Law, p. 11, and note 1. Nor can jurors be permitted to consult their own judgment, experience, or knowledge for the purpose of supplying a deficiency in the proof. In the exercise of their judgment, experience, or knowledge, they must be confined to the weight, credibility, and sufficiency of the evidence offered. Their province is "to determine the facts in the case from testimony given by witnesses, and not from their own judgment or experience or knowledge." *Burrows v. Transportation Co.* (Mich.), 64 N. W. 501, 29 L. R. A. 468. Nor can they take judicial cognizance of the fact that sparks may be borne a given distance by the wind. *Hinds v. Barton*, 25 N. Y. 547. In the case of *Musselwhite v. Receivers*, 4 Hughes 166, Fed. Cas. No. 9,972, the distance was 40 yards; and the court directed a verdict for the defendant, saying: "The trains in this case were running lawfully over the company's property. * * * Running thus, they are not responsible for fires arising from sparks proceeding from their own engines, unless it is proved that the emission of the sparks was due to negligence on the part of the defendants, either in using engines improperly equipped

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and furnished, or in using properly furnished engines in some negligent manner." In *Hagan v. Railroad Co.*, 86 Mich. 615, 49 N. W. 509, the building destroyed was 160 feet from the track. The opinion expressly points out the evidence tending to prove actual negligence, and the decision is made to rest upon that point, and not upon the distance. In *Railroad Co. v. Lacey*, 89 Pa. St. 458, the distance was 90 feet from the railroad, and yet the court justified the submission of the case to the jury upon the ground that the evidence showed the emission of unusually large cinders by the locomotive. To the same effect is *Sheldon v. Railroad Co.*, 14 N. Y. 218, where the distance was 67½ feet; *Huyett v. Railroad Co.*, 23 Pa. St. 373, where the distance shown was 77 feet; *Missouri Pac. Ry. Co. v. Texas & P. Ry. Co.* (C. C.), 41 Fed. 917, the distance being from 100 to 150 feet; *Gumbel v. Railroad Co.*, 48 La. Ann. 1180, 20 South. 703, the distance shown to be more than 40 feet, though how much further is not stated; *Railroad Co. v. McClelland*, 42 Ill. 355, the distance proven to be 100 feet. In *Hull v. Railroad Co.*, 14 Cal. 387, while the distance is not shown in the statement of facts, the court said, "There was proof to show that this result was not probable from the ordinary working of the engine," and sustained the ruling of the lower court in submitting the question of negligence *vel non* to the jury for this reason. Many other cases can be found where the distance between the property destroyed and the track was greater than here, yet in none of them is it intimated by the court that mere proof of this fact was evidence of negligence in fact. Nor can the expression in the case of *Railroad Co. v. Malone*, 109 Ala. 516, 20 South. 36, that "we are of opinion that it can be laid down as a sound proposition of law, in no wise dependent upon the experience and observation of jurors, as distinguished from common knowledge, that, if fire is originated by the falling of sparks from an engine at a distance of sixty-three feet, it is the result of negligence, arising either from improper management of the engine or defective appliances," when construed

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in connection with the evidence in the cause, be said to so hold; for the justice delivering the opinion expressly says in the next succeeding sentence that "certainly the testimony of defendant's witnesses in this case as to the effect of suitable spark arresters upon sparks escaping from it, and a proper handling of the engine, admit of no other conclusion." The testimony here referred to was undisputed "that it was impossible for engines of that construction and same appliances to set fire to anything along its [defendant's] track." If this was true, and the fire did originate from sparks emitted from an engine, then, of necessity, there must have been some defect in the equipment of the engine, or a negligent operation of it. That case is clearly distinguishable from the one under consideration. In that case there was evidence of "an unusual and large rush of sparks from the engine," and, as we have above pointed out, that it was impossible for engines properly equipped and handled to emit sparks which would set fire to property along the track. No such evidence was introduced in this case. Had there been, in view of the evidence offered by the defendant, the question of actual negligence *vel non* would have been a question of fact for the jury. The first above quotation from Railroad Co. v. Malone, construed properly, is not at variance with the principles announced in Railroad Co. v. Reese, *supra*, which is the almost universal rule in England and this country, and does not go to the extent of holding the presumption, which we have shown cannot be accorded the effect of evidence, to establish actual negligence, but simply indulged by the courts for the sole purpose of requiring the company to explain and show that it has performed its duty with respect to the equipment and operation of its locomotives, is a conclusive one, incapable of rebuttal. Manifestly, this is true when we take into consideration that no man can say to what precise distance a spark may be driven by the wind and kept alive by the atmospheric conditions prevailing at the time of its emission, and also the fact, which is common knowledge, and proven

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undisputedly in this case, that fire will escape from the best equipped and most prudently operated locomotives in sufficient quantities to ignite combustible material along the track. *Railroad Co. v. Miller*, 109 Ala. 506, 19 South. 989. Again, it may be said that the plaintiff's evidence shows that the engine was emitting a great many sparks. But it was not shown that this was unusual, or that a properly equipped and prudently conducted engine would not emit quite as many as this one did, loaded as this one was, going at the same rate of speed, upon a similar grade, and burning the same kind of fuel. Indeed, the witnesses for the plaintiff say that they noticed nothing ~~Same—Same—~~
~~Same—Speed.~~ unusual about the engine or its operation, except its speed and the engineer operating the engine testified that it was emitting no more sparks than the usual amount when passing the point where the cotton was located. "Proof that the fire occurred while the engine was running at rate of speed greater than that allowed by law does not of itself establish the liability of the company." 3 Wood, R. R. p. 1603. This being so, obviously, when the rate of speed was not regulated by any statute, as in this case, the rapidity with which the train was travelling cannot have the effect of tending to prove negligence in the construction, equipment, or operation of the engine. While the evidence introduced by the plaintiff was competent for the purpose of proving the communication of fire by sparks emitted by the engine, yet it does not tend in the remotest degree to prove negligence in fact, which the plaintiff is bound to do, after the shifting of the burden upon it by the proof made by the defendant of due care. See, also, *Searles v. Railway Co.*, 101 N. Y. 661, 5 N. E. 66; *Grant v. Railroad Co.*, 133 N. Y. 657, 31 N. E. 220; *Flinn v. Railroad Co.*, 142 N. Y. 11, 36 N. E. 1046; *Railway Co. v. Jackson*, 18 Eng. Ruling Cas. 677.

The remaining question which we will discuss is the one involving the doctrine of contributory negligence, invoked against the plaintiff in placing its cotton upon its premises so near the track of the defendant's road as that, in case the

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agents or servants of the defendant are negligent in the management of the locomotive, or in case there is negligence in the construction of the engine, the cotton may be destroyed by fire caused by sparks emitted from the engine. Where contributory negligence is pleaded, it is a plea in confession and avoidance, which admits negligence on the part of the defendant, but seeks to avoid liability therefor by alleging that the plaintiff was guilty of negligence which contributed to his injury. 5 Enc. Pl. & Prac. 11. "Assuming as a postulate the negligence of a defendant as a proximate cause of an injury, then the essential elements of contributory negligence on the part of a person injured are (1) a failure on his part, or the part of some person with whose negligence he is chargeable, to exercise ordinary care to avoid injury; and (2) a proximate connection between such failure to exercise ordinary care, and the injury, so direct and immediate that but for such want of ordinary care the injury would not have occurred. That is, the negligence of the defendant and the negligence of the plaintiff must have been so inextricably mingled together, jointly and in combination causing the injury, that it cannot be said that the injury would have happened, had the plaintiff or person injured been free from fault at the time of the injury. But plaintiff's act or omission when only a remote cause or a mere antecedent occasion or condition of the injury is not contributory negligence." 4 Am. & Eng. Enc. Law, 18, and notes. The only limitation upon the right of enjoyment of one's property is to do so in such manner as not to injure that of another. "*Sic utere tuo ut alienum non laedas.*" This is the sum and substance of his whole duty. In placing his cotton upon his own premises, the plaintiff was in the exercise of a lawful right, and no possible injury could come from that act to others. He cannot be required, in locating it, to anticipate the negligence of the defendant. On the contrary, he would have the right to presume that the defendant would use properly equipped locomotives, and that its agents or servants would operate them in a careful manner. It is true the plaintiff is charge-

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able with the knowledge that properly constructed and equipped engines, carefully handled, when in operation, emit sparks. And should he place his property within the area within which sparks or live cinders may fall from a properly equipped engine, carefully handled, and it is destroyed by fire caused by sparks so emitted, it is his loss. But this loss must be attributed to the fact that the railroad company has been guilty of no negligence, and cannot be made to rest upon the doctrine of contributory negligence. The fact that the area within which sparks or live cinders may fall from a properly equipped engine, carefully handled, is incapable of definite ascertainment, does not and cannot affect the principle. The area within which they are likely to fall and ignite inflammable substances depends upon the atmospheric conditions, the velocity of the wind, the speed of the engine at the time they are emitted, and many other conditions. However, the railroad company, while operating its properly equipped engines in a careful manner, is not responsible for results flowing from the action of any of these conditions upon the sparks or hot cinders emitted by them. The principles involved in the question under consideration are very clearly stated in the case of *Railroad Co. v. Hendrickson*, 80 Pa. St. 182. It is there said: "The defend- Same—Contributory Negligence. ants rested their case on the condition of the roof of the barn and the dry weather. The substance of the defendants' points was that, if the condition of the barn was such as to render it more liable to take fire than if it had a secure and safe roof, the plaintiff was guilty of contributory negligence in suffering it to be in that condition. This is clearly unsound, and, if sustained, would require the owner of property lying along a railroad to keep it in a condition to be always safe from sparks or fire thrown from the passing engines. It would deprive the owner of the enjoyment of his property in the way most suited to himself. He could not put his hay into stacks or ricks, or suffer straw to lie around his barn for his cattle to feed or rest upon. He

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must keep his houses, outhouses, stables, and barns under the best-known safe roofs, or insure them against the negligence of the company. An owner of property near to a railroad must run all the risk of a proper and careful use of the road, for this is the company's right. When the railroad company uses the most approved spark arresters, and the proper care and vigilance in the running of its engines, and the landowner's barn or hayrick or meadow takes fire from the sparks thrown out, he has no remedy. It is his own risk if he builds too near to the railroad, or erects his stacks or scatters his straw where they may be consumed by fire caused by no negligence. But when actual negligence is proved, and the loss arises from it, the mere condition of his property is no defense to the company. * * * The conclusion from the cases is very clear that a plaintiff is not responsible for the mere condition of his premises lying along a railroad, but, in order to be held for contributory negligence, must have done some act or omitted some duty which is the proximate cause of his injury, concurring with the negligence of the company." The placing of the cotton in the place where it was when destroyed cannot be said to be the proximate cause of its destruction, but a mere condition. If destroyed by the negligent act of the defendant, this was the direct and proximate cause. We are aware that in some jurisdictions the doctrine of contributory negligence has been recognized and enforced in this class of cases. But the great weight of authority in this country and in England is decidedly the other way. Upon principle, we do not think it has any application to this sort of a case. 8 Am. & Eng. Enc. Law, 16, and authorities cited in note 1; Shear. & R. Neg. § 679, and note; note on page 74 of 38 Am. Dec. (*Burroughs v. Railroad Co.*). Reversed and remanded.

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GARRETT *et al.*

v.

SOUTHERN RY. CO.

(*Circuit Court of Appeals, Sixth Circuit, March 15, 1900.*)

Fires Set by Engines—Negligence—Burden of Proof.*—It is not judicially known to the court that the art of burning coal in a locomotive, and of providing the preventives for the emission of sparks has reached such a stage of perfection that it is improbable that a fire could be communicated by sparks from a locomotive except through the negligence of the railroad company; and, in the absence of statute, the mere fact that a fire was caused by sparks from its locomotive is not *prima facie* evidence of negligence on the part of the defendant railroad.

ERROR by plaintiffs to the circuit court of the United States for the Western district of Tennessee. *Affirmed.*

C. G. Bond and *J. M. Boone*, for plaintiffs in error.

W. J. Lamb and *F. P. Poston*, for defendant in error.

Before TAFT, LURTON, and DAY, Circuit Judges.

TAFT, Circuit Judge. This is a writ of error brought to review a judgment for the defendant, the Southern Railway Company, in a suit filed against the company by G. W. Garrett and H. E. Ray for \$20,000 damages for alleged negligence of the company resulting in the burning and destruction of the planing-mill plant and stock of lumber of the plaintiffs at Pocahontas, Tenn., on December 27, 1898. The declaration alleged that the fire which destroyed the property was caused by sparks emitted from an engine negligently constructed and operated by the defendant company on its switch track in front of the plain-

*See *Louisville & N. R. Co. v. Marbury Lumber Co. (Ala.)*, *ante* and *foot-note*.

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tiffs' mill. The cause was originally brought in the circuit court of McNairy county, Tenn., and was removed to the court below by the railway company on the ground of diverse citizenship of the parties. The defendant denied that sparks from its engine caused the accident, and further denied any negligence in the construction or operation of its locomotives. The case was heard, and the jury returned a verdict for the defendant.

The sole question presented by the record for our consideration is whether the rule which the court laid down as to the burden of proof was correct. There is not in Tennessee, as there is in many other states, a statute defining the rule to be enforced as to the burden of proof in such cases. The question presented to the court below and presented here is one of common law. The court below, in effect, instructed the jury that, as the plaintiffs charged the defendant with negligence, the burden was on the plaintiffs to show the defendant's negligence by a preponderance of the evidence; that, when the plaintiffs established by such preponderance the mere fact that the fire was caused by sparks from an engine of the defendant, it still remained for him to prove that the emitting of such sparks was due to defendant's negligence; that, if the jury found as a fact that under the present approved methods of constructing and operating locomotives it was improbable that fire could be communicated by sparks from an engine without negligence, then the jury would be justified in inferring as a fact, from the mere circumstance of the fire and its origin in the emission of sparks, that the fire was caused by the negligence of the defendant. The court declined to charge the jury, as matter of law, that mere proof that the fire was caused by sparks from an engine was *prima facie* evidence of the negligence of the defendant. There is great contrariety of opinion in the cases upon the question whether the mere communication of fire by sparks of an engine is *prima facie* evidence of negligence in a railway company. The question is further complicated by the fact that in many states statutes have been

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passed which make such evidence *prima facie* evidence of negligence. Without examining the cases, we think we may say that nearly all the earlier cases hold that the burden is upon the plaintiffs not only to show that the fire was caused by the sparks, but that the sparks were emitted through the negligence of the defendant. In later cases the effect of the state statutes, and the difficulty attending the proof of negligence, arising from the fact that the condition of the engine is a matter wholly within the knowledge and control of the defendant company, have led courts into making this an exception to the ordinary rule in cases of negligence.

The real point in controversy here is whether the art of burning coal in a locomotive, and of providing the preventives for the emission of sparks, is judicially known to the court to have reached that stage of perfection that it is improbable that a fire could be communicated except through the negligence of the railroad company either in the construction or operation of the locomotive. It is urged upon us that in the state of Tennessee, in *Burke v. Railroad Co.*, 7 Heisk. 451, and *Simpson v. Railroad Co.*, 5 Lea 456, the law of Tennessee has been settled in favor of the contention of the plaintiffs in error here that proof of fire from sparks is *prima facie* evidence of negligence. As we have said, this question is not controlled by any statute in Tennessee, and the rules of evidence in the federal court are questions of general law, not controlled by state decisions. We think we must take as our guide in this action the intimation of the supreme court of the United States in the Nitroglycerin Case, 15 Wall. 524, 21 L. Ed. 206. In that case a lessor attempted to hold a lessee for damages for injuries to the building leased by the explosion of nitroglycerin while in charge of the defendants. Upon this point the court, speaking by MR. JUSTICE FIELD, held as follows:

"This action is not brought upon the covenants of the lease. It is in trespass for injuries to the buildings of the plaintiff, and the gist of the action is the negligence of the defendants. Unless that be established, they are not liable. The mere

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fact that injury has been caused is not sufficient to hold them. No one is responsible for injuries resulting from unavoidable accident while engaged in a lawful business. A party charging negligence as a ground of action must prove it. He must show that the defendant by his act, or by his omission, has violated some duty incumbent upon him, which has caused the injury complained of. The cases between passengers and carriers for injuries stand upon a different footing. The contract of the carrier being to carry safely, the proof of the injury usually establishes a *prima facie* case, which the carrier must overcome. His contract is shown, *prima facie*, at least, to have been violated by the injury. Outside of these cases, in which a positive obligation is cast upon the carrier to perform safely a special service, the presumption is that the party has exercised such care as men of ordinary prudence and caution would exercise under similar circumstances, and, if he has not, the plaintiff must prove it. Here no such proof was made, and the case stands as one of unavoidable accident, for the consequences of which the defendants are not responsible. The consequences of all such accidents must be borne by the sufferer as his misfortune. This principle is recognized and affirmed in a great variety of cases,—in cases where fire originating in one man's building has extended to and destroyed the property of others; in cases where injuries have been caused by fire ignited by sparks from steamboats or locomotives, or caused by horses running away, or by blasting rocks; and in numerous other cases which will readily occur to every one."

We think that this language indicates that the supreme court of the United States would adhere to the older and more conservative view that the mere ignition by sparks is not *prima facie* evidence of negligence of the railroad company as a matter of law. It may be that evidence as to the approved methods for preventing emission of dangerous sparks may justify an inference of fact that the fire could not have been thus communicated without negligence. This was the charge of the court. The jury were given permis-

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sion, from the mere fact of the ignition by sparks, to infer, if they could as a matter of fact, that it was caused by negligence; but the court declined to charge them, as a matter of law, that it raised a presumption of negligence. The course of the court, we think, was well within the rule, as we understand the cases, which the supreme court of the United States has followed, and that no prejudice was done to the plaintiffs in the charge which was given. The judgment is affirmed.

PIERCE

v.

BANGOR & A. R. Co.

(*Supreme Judicial Court of Maine, May 22, 1900.*)

Fires Set by Locomotives—Right of Railroad to Insure—Statute.*
—The liability of a railroad company to make compensation for injury to property along its route by fire communicated by a locomotive engine in its use, created by statute (Rev. St. c. 51, § 64), is co-extensive with the right given to the railroad company by the same statute to insure such property.

Same—Same—Same—Liability for Property Not Insurable.—For the company to be liable there must be such elements of permanency in the situation of the property that the railroad company may have a reasonable opportunity to protect itself against its liability by insurance. Upon this principle, a railroad company is not liable for the destruction of property, under the statute, temporarily located along its route, and which may be so soon and so readily moved that the company cannot, by the exercise of reasonable diligence, protect itself against liability by insurance, but the company is liable under the statute for merchandise, lumber, or other chattels regularly and permanently located along its route.

Same—Same—Whether Property Insurable.—*Held*, that the property of the plaintiff destroyed by fire communicated by a locomotive engine in the defendant's use had such elements of permanency in

*See *Garrett v. Southern Ry. Co.* (C. C. A.), *ante* and *foot-note*.

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its situation and other conditions as to place it within the protection of the statute.

Witnesses—Memorandum to Assist Memory.—The plaintiff testified that shortly before the fire he had taken an account of the ship-knees, the property destroyed; that in the first instance he made his memoranda upon a shingle, and subsequently, upon the conclusion of his account taking, he transferred the result of his account to a small memorandum book. In answering a question as to the number and sizes of these ship-knees destroyed, he was allowed by the court to refer to the small memorandum book for the purpose of refreshing his recollection, against the defendant's objection, as stated, that "this book is not a book of original entry." *Held*, that the ruling was correct; that for this purpose it was not necessary that the writing should have been an original one.

Same—Same.—Where objection is made because the witness, after referring to his memoranda, had no independent recollection of the facts that he testified to, *held*, that this objection is also unavailing. A witness may be allowed to assist his memory by referring to writings, when he recollects having seen the writing before, although he has at the time of testifying no independent recollection of the facts mentioned in it, if he remembers that, at the time he saw the writing before, he knew the contents to be correct.

(Official.)

EXCEPTIONS by defendant from Piscataquis county supreme judicial court. *Exceptions overruled.*

Argued before EMERY, HASKELL, WISWELL, STROUT, and SAVAGE, JJ.

H. Hudson and M. L. Durgin, for plaintiff.

F. H. Appleton and H. R. Chaplin, for defendant.

WISWELL, J. This is an action to recover damages for the destruction of a quantity of ship-knees belonging to the plaintiff, and situated along the route of the defendant's railroad, by fire communicated by a locomotive engine in the defendant's use. The plaintiff's writ contains two counts,—one, alleging that the destruction of the plaintiff's property by fire was caused by the defendant's negligence; the other, based upon the statute (Rev. St. c. 51, § 64).

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At the trial there was no controversy as to the nature, location, or description, except as to quantity, of the plaintiff's property, and the testimony on behalf of the plaintiff, as to the time during which, and the manner in which, he had been storing these ship-knees, in the place where they were when destroyed by fire, was undisputed. Consequently the justice presiding instructed the jury, in effect, that the defendant was liable under the statute, and that they need not consider the allegations of the defendant's negligence. To this instruction the defendant excepted, the only question presented thereby being as to whether the nature, situation, and condition of the plaintiff's property, and the length of time during which the place where the loss occurred had been used by the plaintiff for this purpose, were such as to bring this property within the meaning and protection of the statute upon which this count in the writ was based.

From the uncontradicted testimony upon the part of the plaintiff, these facts appear: The property destroyed by fire was along the route of the defendant's railroad; in fact, it was within and about a storehouse or shed on the company's land, placed there with the consent of the defendant's predecessor in the ownership of the road, and maintained, since 1892, with the implied consent of the defendant. It was built by the plaintiff in the year 1881 or 1882, for the purpose of storing ship-knees therein. The shed was an inexpensive one, costing originally, as testified by the plaintiff, about \$125; but it was a frame building, placed upon cedar posts set in the ground, its roof was boarded and shingled, and its sides boarded, although the lower boards were removed from time to time as the plaintiff had occasion to do so for the purpose of putting in or taking out these knees. The building was 92 feet long, 19 feet wide, and 16 feet posted on the one side, and 11 to 12 feet on the other.

From the time that this shed was first built, in 1882, 10 years before the defendant commenced the operation of the railroad, up to the time of its destruction by fire, May 21,

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1896, it had been continuously used by the plaintiff for the storage of knees, which he was engaged in the business of buying, getting out himself, and selling; and during all of that time, according to the undisputed testimony in behalf of the plaintiff, he had also occupied the land in the immediate vicinity of the shed for the purpose of piling there these knees. A portion of the knees was each year brought there upon the defendant's railroad, unloaded from a siding near the shed, hauled some distance by the plaintiff to his mill to be finished or dressed, and then hauled back to the storehouse, where and about which they were stored until sold, when they were generally shipped over the defendant's railroad. The plaintiff testified that this business had amounted during these years to something about \$7,000 each year.

Under these circumstances, we think that the plaintiff's property, that outside of the shed as well as inside, came within the protection of the statute, and that the ruling that the defendant was liable for its destruction by fire admitted to have been communicated by one of its engines was correct.

When this statute was first considered by the court in *Chapman v. Railroad Co.*, 37 Me. 92, the court construed it as giving to the railroad company a right to insure property along its route coextensive with the company's liability for its destruction. "To make this right to insure property of any practical value to the corporation, the property must be of such a character and so situated as to render insurance practicable by the use of reasonable diligence." And it was then decided that a railroad company is not liable under this statute for property which is so temporarily located along its route that the company does not have a reasonable opportunity to insure it.

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This general principle has been followed by the court in all of the cases that have come before it. For instance, in *Chapman v. Railroad Co.*, *supra*, the court held that the property destroyed by fire had no established location, that

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it was deposited and removed with such facility as to render insurance impracticable and unavailable, and that consequently it was not within the meaning of the statute. In *Lowney v. Railroad Co.*, 78 Me. 479, 7 Atl. 381, the decision of the court that the company was not liable was based upon the fact that the property destroyed consisted of movable articles, temporarily placed near the railroad track, as in the case of *Chapman v. Railroad Co.*

But in *Stearns v. Railroad Co.*, 46 Me. 95, to recover damages for the destruction of a chair factory, the machinery and tools therein, and chairs wholly or partially manufactured, together with stock used in their manufacture; in *Bean v. Railroad Co.*, 63 Me. 294, to recover for the destruction of a stock of goods in a store occupied by the plaintiff near the railroad track; and in *Thatcher v. Railroad Co.*, 85 Me. 502, 27 Atl. 519, to recover for the destruction of a quantity of lumber stored upon a piling ground near the defendant's track, which had been used by the plaintiff for the same purpose for a number of years in connection with his mill, with the knowledge of the defendant company, which had built side tracks to facilitate the shipping of lumber from the piling place,—this court held that in each of these cases the railroad company was liable.

The distinction between these two classes of cases is well marked. They are all decided upon the construction of the statute laid down by the court in the first case in which it was considered; that is, that the liability of the company should be co-extensive only with its practical opportunity to insure the property along its route for which it might be liable.

Same—Same—
Same—Liability
for Property Not
Insurable.

For the company to be liable there must be such elements of permanency in the situation of the property that the railroad company may protect itself against its liability by insurance. Upon this principle a railroad company is not liable for the destruction of property, under the statute, temporarily located along its route, and which may be so soon and so easily moved that the company

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cannot, by the exercise of reasonable diligence, protect itself against liability by insurance; but the company is liable under the statute for merchandise, lumber, or other chattels regularly and permanently located along its route.

It is, of course, unnecessary in any of these cases that the identical articles should remain situated along the route for any particular length of time. These may be constantly changing, as do the various articles in a stock of goods, while the stock itself, replenished from time to time, remains permanently in the place designed for it. The permanency here referred to means the permanent use of the particular place for the same kind of articles or goods. We think that the character of this property belonging to the plaintiff, and the long-continued use that he had made of this storehouse, and its immediate vicinity, for the purpose of storing there his ship-knees, continuously since 1882, clearly bring the case within the meaning of the statute.

For the purpose of proving the number and sizes of the knees destroyed, the plaintiff testified that on the 12th and 13th days of May, a few days before the fire, he took an account of the same, in the first instance making his memoranda upon a shingle, the result of which he later, on the afternoon of the 13th, transferred to a small memorandum book. In answering a question as to the number and sizes of the knees that he had taken an account of, he referred to this memorandum book, when the counsel for the defense objected to such reference, giving as a reason that "this book is not a book of original entry." The court overruled the objection, and allowed the witness to refer to this book for the purpose of refreshing his recollection. The absence of the shingle upon which the original memoranda were made was unaccounted for. To this ruling the defendant excepted.

Objection is now made because the witness after referring to his memoranda had no independent recollection of the

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erty Insurable.

Witnesses-
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fact that he testified to. But this did not appear to be the case at the time, and objection was not made Same—Same. at the time for this reason. The justice presiding only ruled that the witness might refer to his book containing memoranda, made at the close of his stock taking, to refresh his recollection, and the objection was that he should not be allowed to look at the book even for that purpose, because it was not the book of original entry. For this purpose it was not necessary that the writing should have been an original one.

But, even if the objection now urged had been made at the time, we think that it would have been unavailing. A witness may be allowed to assist his memory by referring to writings, "where the witness recollects having seen the writing before, and, though he has now no independent recollection of the facts mentioned in it, yet he remembers that, at the time he saw it, he knew the contents to be correct." 1 Greenl. Ev. § 437.

When the testimony relates to dates, figures, amounts, or quantities, which can be retained in the memory with difficulty, if at all, this rule is, we believe, a necessary and wise one, and is productive of more good than harm. The rule as above stated is quoted in full and with approval in Dugan v. Mahoney, 11 Allen 572.

The only question raised by the defendant's motion for a new trial is as to the amount of damages assessed by the jury, as this was the only question submitted to the jury. But this ground for a new trial is not urged by the defendant's counsel in argument, and we think that the amount of the damages assessed was authorized by the evidence.

Motion and exceptions overruled.

ILLINOIS CENT. R. CO.

v.

BENTZ.

(Circuit Court of Appeals, Sixth Circuit, February 12, 1900.)

Death of Engineer—Negligence of Telegraph Operator—Fellow Servants.*—If the death of a locomotive engineer resulted from the negligence of a telegraph operator in failing to keep the train dispatcher advised as to the whereabouts of the engineer's train, there could be no recovery for the death, as such negligence was at common law that of deceased's fellow servant.

ERROR by defendant to the circuit court of the United States for the Western district of Tennessee. *Reversed.*

This is a writ of error to review a judgment of the circuit court for the Western district of Tennessee in favor of Isabella Bentz against the Illinois Central Railroad Company. Isabella Bentz is the widow of Ed. Bentz, who was an engineer on a locomotive engine of one of the freight trains of the defendant company, and was killed by a collision between two trains of that company at a point two miles north of the town of Russell, in the state of Tennessee. This action was brought under the statute of Tennessee providing for damages for injury by wrongful death. The evidence disclosed the facts to be as follows: Bentz's train was freight train No. 84. The train with which it collided was freight train No. 81. Bentz's train was running north from Jackson, Tenn., towards Martin, Tenn., a distance of 53 miles. The only telegraph station open at night between Jackson and Martin was at Milan, 23 miles from Jackson. The train dispatcher was at Jackson. Bentz's train left Jackson at 2:40 a. m. on the morning of June 10, 1897, and

*See notes at end of case.

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proceeded north. It approached Milan about 20 minutes after 4. The engineer blew for the semaphore signal, which was set at red, and failed to receive the white signal in reply. He blew again when about 200 feet from it, and the trainmen testify that then the red signal turned to white. The telegraph operator denies that the signal was whistled for, or that the white light was signaled. However this may be, the train then proceeded north from Milan towards Martin, which was the next telegraph station open at night, and at a point two miles north of Russell, in going round a curve, collided with train No. 81, coming south. Bentz jumped to save his life, and was killed by the fall. The collision took place about 5:20 in the morning. At 4:30 that morning freight train 81 was reported to the train dispatcher as being at Martin, and orders for its proceeding were asked for. Thereupon the train dispatcher asked Loving, the telegraph operator at Milan, over the wire, whether train 84 had come in sight. Loving replied that it had not passed, and was not in sight. Thereupon the train dispatcher sent identical orders, one to Martin, to 81, and one to Milan, to 84, directing that the two trains meet at Idlewild, a point 10 or 12 miles north of Milan and 7 miles south of Russell. This order was acknowledged (or "O. K.'d," as the phrase is) by the telegraph operators at Milan and at Martin. The theory of the defendant company is that Bentz and the conductor in charge of his train ran through Milan in spite of the red signal and without waiting for the white light. At the conclusion of all the evidence, counsel for the defendant requested the court to charge the jury that from the evidence introduced it was apparent that the accident was caused either by the negligence of the telegraph operator at Milan, who was a fellow servant of Bentz, or by Bentz's own negligence, and that they must therefore return their verdict for the defendant. This the court refused. The jury, under the charge of the court, returned a verdict for plaintiff, on which judgment was entered.

Illinois Cent. R. Co. *v.* Bentz*C. G. Bond*, for plaintiff in error.*S. D. Hays*, for defendant in error.

Before TAFT, LURTON, and DAY, Circuit Judges.

TAFT, Circuit Judge (after stating the facts as above). If Bentz disregarded the red signal, and passed Milan without waiting until the white signal was shown him, it is not disputed that the resulting collision would have been due to his negligence, and that he could not recover from the company. The only other possible theory of the accident is that the telegraph operator gave the white signal to Bentz, the engineer, as the men on Bentz's train testify he did, and that, when he was asked a few minutes later by the train dispatcher at Jackson whether the train had passed, he negligently forgot the fact. If he had then remembered that Bentz's train had passed his station 15 minutes before, and had so informed the operator; it would have been entirely within the power of the train dispatcher either to hold 81 at Martin, or to permit it to run on to Greenfield, a distance of nine miles, and there wait the coming of Bentz's train. The failure of the telegraph operator to keep the train dispatcher advised as to the whereabouts of Bentz's train was the cause of the collision, and the only cause, unless Bentz contributed to it by his own negligence, as already explained. We have already decided in this court, in the case of *Railroad Co. v. Camp*, 31 U. S. App. 213, 13 C. C. A. 233, 65 Fed. 952, that at the common law (and there is no statute in Tennessee) a telegraph operator is the fellow servant of an engineer. See, also, *Railroad Co. v. Clark*, 16 U. S. App. 17, 6 C. C. A. 281, 57 Fed. 125; *Slater v. Jewett*, 85 N. Y. 61; *Sutherland v. Railroad Co.*, 125 N. Y. 737, 26 N. E. 609; *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38, 25 Atl. 175; *McKaig v. Railroad Co.* (C. C.), 42 Fed. 288. The fact that the supreme court of Tennessee, in the case of *Railroad Co. v. De Armond*, 86 Tenn. 73, 5 S. W. 600, had taken another view of this ques-

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tion, under the department theory of fellow servants, which prevails in the state courts of that state, was noted in the Camp Case, and the view of the Tennessee court was dissented from. If the De Armond Case is the authority which was followed by the learned judge at the circuit, the Camp Case could not have been called to his attention. The jury, on the facts of the case, because the injury occurred through the negligence of a fellow servant of the plaintiff's husband, should have been directed to bring in a verdict for the defendant. The judgment of the court below is reversed, with directions to order a new trial.

NOTES.

Telegraph Operator as Fellow Servant of Trainmen.—In *Oregon, etc., Ry. Co. v. Frost*, 74 Fed. Rep. 965, it was held that a local telegraph operator at a station, who receives and delivers the orders of the train dispatcher is the fellow servant of the employees of the railroad company in charge of a train.

A station telegraph operator is a fellow servant of a locomotive engineer. *Dana v. New York C. & H. R. R. Co.*, 23 Hun (N. Y.) 473; *Price v. Detroit, etc., R. Co.*, 145 U. S. 651 (affirmed by divided court); *Baltimore & O. R. Co. v. Camp*, 65 Fed. Rep. 952, 13 C. C. A. 233.

A telegraph operator, who is also the station agent, is a fellow servant of a fireman on a locomotive. *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38, 25 Atl. Rep. 175; *Dealey v. Philadelphia & R. R. Co. (Pa.)*, 3 Cent. Rep. 112.

Where the function of the operator is to merely transmit the dispatcher's orders to the trainmen, he is their fellow servant. *Baltimore, etc., R. Co. v. Camp*, 65 Fed. Rep. 952, 31 U. S. App. 213.

The negligence of a telegraph operator in failing to stop a train and deliver the dispatcher's orders whereby a collision was caused, and plaintiff, a fireman on one of such trains was injured, is the negligence of a fellow servant. *McKaig v. Northern Pac. R. Co.*, 42 Fed. Rep. 288.

A telegraph operator who is charged with the duty of displaying signals to regulate the movement of trains is a fellow servant with a locomotive engineer, preventing the latter from recovering for an injury received through the negligence of the other, when no charge of

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incompetency is made. *Monagan v. New York C. & H. R. R. Co.*, 45 Hun 113, 9 N. Y. S. R. 672.

Where the operator fails to perform his duty of so signalling trains as to keep them sufficiently apart, his negligence is that of a fellow servant of a fireman. *Cincinnati, etc., R. Co. v. Clark*, 57 Fed. Rep. 125, 16 U. S. App. 17.

A telegraph operator who is intrusted with the receiving and delivering messages from the company's train dispatcher to the persons operating trains is a fellow servant with a fireman on a train. *McKaig v. Northern Pac. R. Co.*, 42 Fed. Rep. 288.

In *Slater v. Jewett*, 85 N. Y. 61, 5 Am. & Eng. R. Cas. 515, it was held that a fireman was the fellow servant of an operator.

A telegraph operator is not a fellow servant of a fireman on a wild-cat train. *Sheehan v. New York C. & H. R. R. Co.*, 12 Am. & Eng. R. Cas. 235, 91 N. Y. 332, reversing 25 Hun 310.

Same—Contrary Decisions.—In certain cases arising in jurisdictions where the different department limitation obtains, it has been held that the telegraph service is distinct from that in which trainmen are employed, and that the servants in the two departments are therefore not fellow servants. *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610, 57 Am. Rep. 695; *East Tennessee, V. & G. R. Co. v. De Armond*, 86 Tenn. 73, 6 Am. St. Rep. 816.

Under the provisions of Miss. Const. 1890, § 193, which recognizes the different department limitation, it has been held that a telegraph operator and a locomotive fireman are not fellow servants. *Illinois Cent. R. Co. v. Hunter*, 70 Miss. 471.

In *Frost v. Oregon, etc., R. Co. (C. C.)*, 69 Fed. Rep. 936, it was held that an operator acted as vice principal in giving an engineer notice of a change of time in the movement of his train.

In *Hogan v. Missouri, etc., R. Co.*, 88 Tex. 679, it was held that operators who ordered the movements of trains were not the fellow servants of engineers.

In *Hall v. Galveston, etc., R. Co.*, 39 Fed. Rep. 18, it was held that the master was liable for the operator's neglect for failure to report a defect in the roadbed, whereby a brakeman was injured.

Lellis v. Michigan Cent. R. Co

LELLIS

v.

MICHIGAN CENT. R. Co. *et al.*

(*Supreme Court of Michigan, May 15, 1900.*)

Liability of Company Transferring Cars for Death of Employee of Receiving Company.*—A railroad company transferring cars loaded with lumber to another carrier, is not liable for the death of an employee of the latter caused, after the cars have been inspected by the receiving company, by reason of defective sidestakes used to hold the lumber in place.

Fellow Servants—Car Inspector and Switchman.†—An inspector of foreign cars and a switchman employed in switching them, where they are employees of the same railroad, are fellow servants.

Inspection of Foreign Cars—Liability to Employees.‡—Where a railroad has employed a competent inspector of foreign cars, it is not responsible to its employees handling such cars for any negligence of the inspector in the discharge of his duties.

ERROR by plaintiff to Shiawassee county circuit court.
Affirmed.

Lehman Bros. & Stivers (Navin & Sheahan, of counsel),
for appellant.

Lawrence & Butterfield, for appellee Michigan Cent. R.
Co.

T. W. Whitney (Alex L. Smith, of counsel), for appellee
Ann Arbor R. Co.

*See *Missouri, K. & T. Ry. Co. v. Merrill* (Kan.), 17 Am. & Eng. R. Cas., N. S., 470, and *note*, p. 480; *Glynn v. Cent. R. R.* (Mass.), 17 *Id.* 482, and *note*, p. 485.

†See *note*, 14 Am. & Eng. R. Cas., N. S., 558.

‡See *Missouri, K. & T. Ry. Co. v. Merrill* (Kan.), 17 Am. & Eng. R. Cas., N. S., 470, and *note*, p. 481.

Lellis v. Michigan Cent. R. Co

MOORE, J. Stephen Lellis, plaintiff's intestate, was a switchman at work in the yards of the Michigan Central Railroad Company in Detroit. A car load of timber had been unloaded at Cadillac, Mich., upon a flat car.

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The Ann Arbor Railroad Company brought this car to Ann Arbor, where it was transferred to the Michigan Central Railroad, and conveyed by it to Detroit. There were pockets on the sides of the flat car, 4 inches by 4 inches in size, into which to put stakes to hold the load in place. It is claimed the persons loading the car used for stakes 2x4 scantling, joining the tops together by nailing a strip of board thereto. During the switching of the car in the yard at Detroit one or more of these stakes gave way. Some of the timbers fell upon Mr. Lellis, who received injuries from which he soon thereafter died. His widow was appointed administratrix, and brought this suit. The circuit judge directed a verdict in favor of the defendants. The case is brought here by writ of error.

It is the claim of the defendants that the stakes are not part of the equipment of the car, but are part of the load. One witness so swore. It is also claimed that it is a matter of common knowledge upon the part of those at all familiar with the loading and shipping of lumber and timber upon flat cars in this state that the stakes are no part of the car, but the stakes are furnished by the shipper, and when the timber or lumber is unloaded the stakes are not returned with the empty flat car, but a new set of stakes is provided each time the car is loaded. It is said: The stakes being regarded as a part of the load, the company was not liable. The Michigan Central Railroad employed an inspector, whose duty it was to inspect the cars upon their arrival at the junction before the cars passed into the switching yard. This inspector, Mr. Fenwick, was on duty when this car arrived. It was the duty of the inspector, if he found a car was not in a condition to go forward safely, to mark it, "Rejected," and send it to the transfer house. A record is kept of the

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rejected cars, but no record is kept of those which are not rejected. The record did not show that this car was marked, "Rejected." If the inspection was faulty, and would have revealed the defect if the inspector was not negligent, the negligence of the inspector was the negligence of a fellow servant, and the plaintiff cannot recover,—citing *Smith v. Potter*, 46 Mich. 258, 9 N. W. 273; *Dewey v. Railway Co.*, 97 Mich. 329, 52 N. W. 942, 56 N. W. 756, 22 L. R. A. 292; *Jarman v. Railway Co.*, 98 Mich. 135, 57 N. W. 32.

The defendant the Ann Arbor Railroad Company is not liable, under the authority of *Fowles v. Briggs*, 116 Mich. 425, 74 N. W. 1046, 40 L. R. A. 528. The question whether it was the duty of that company to furnish its cars with stakes is not necessarily in the case, and upon it, therefore, we express no opinion.

Liability of Com-
pany Transferring
Cars for
Death of
Employee of
Receiving Com-
pany.

If the defendant the Michigan Central Railroad Company is liable, it must be because it failed to provide inspection which would have disclosed to the inspector the dangerous condition of this load. It is established by the testimony that this company did provide a competent inspector. He either failed to make any inspection, or made a faulty one. In either case, under the decisions of this court, the defendant is relieved from any liability. This inspector and Mr. Lellis, the switchman, were fellow servants engaged in the same common employment. This is not a case involving the duty to furnish safe machinery, and to see that it is kept in proper repair. It is a case involving the duty of a railroad company which is daily receiving, as it is bound to do, cars from other companies for immediate transshipment over its own road. Its duty towards its employees is to provide a competent inspector to inspect these cars when so received, and to determine whether they are in proper condition for transshipment,—this for the reason, as is well known, that cars are apt to become injured while being transported. Immediate super-

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Inspector and
Switchman.

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vision in such cases by "either the ultimate or representative principal" is impossible. When a company has employed such an inspector, it has performed its full duty. The rule is a just and reasonable one. Employees understand this, and contract with reference to it. They know that the master is not liable where it has employed competent servants to perform the work of the same common employment. The rule is so well stated by the late JUSTICE CAMPBELL in *Smith v. Potter*, 46 Mich. 258, 9 N. W. 273, that I quote it: "In such a business as requires the employment of a multitude of persons, beyond the possible constant supervision of either the ultimate or representative principal, there can be no negligence, without the failure to use such precaution in choosing agents and guarding against perils as diligent prudence and foresight require. When the principal has done all that can be reasonably required of him to prevent risks to his servants, he has done all that he owes them. In the present case he appears, beyond dispute, to have done all this; and, if the inspectors committed an error, or were guilty of negligence, he is not to blame for it. The work done is to be done at all hours, and at every place where there are railroad connections with other roads. It is not a duty of management or general supervision, but a task for which nothing is required but fidelity and mechanical knowledge of a comparatively limited kind. It is such work as would seldom be delegated to an officer of extensive responsibility, who has other interests to look after. But, whatever be its quality, it was in this case not claimed to have been placed in wrong hands. Nothing more could be asked of the employer." The facts in that case are not materially different from those in the present. It was also said in *Dewey v. Railroad Co.*, 97 Mich. 334, 52 N. W. 942, 56 N. W. 757, 22 L. R. A. 294 (MR. JUSTICE LONG delivering the opinion): "The master must undoubtedly exercise care in the selection of inspectors, to see that cars are not improperly loaded or overburdened, so that they are danger-

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ous to employees; but, after this has been done, it cannot be claimed that the master is to be held responsible for the faithful performance of the inspector's duty. Any other rule than this would make railroad companies insurers of the lives and limbs of employees." Is not this case within the reasoning of the Potter Case? In that case the deadwoods of one car, which was rather lower than the other, had been loosened, and were leaning down so that the deadwoods of the lower car went partially under those of the higher one, catching the plaintiff's arm. Whether the car was started out by the other road in this condition, does not appear. Would it have made any difference had this been the case? Is the receiving railroad liable when another road has transferred to it a car defective in construction, and not liable when the defect has occurred during the transshipment? Is not the duty of the inspector the same in both cases? Is he not as much bound to reject the car in one case as in the other? Can the receiving company act in any other way than through an inspector? It does not have, cannot have, and is not by law required to have any other employee than an inspector to determine when cars received from another road are in condition fit for transportation over its own road? Suppose a case where the stakes used were originally sufficient, but one or more had become broken by accident in transportation, and new stakes supplied by the trainmen, which were insufficient; would the receiving road be liable for the failure of judgment or neglect on the part of the inspector? The case of *Morton v. Railroad Co.*, 81 Mich. 423, 46 N. W. 111, has no bearing upon the question now before the court. The question of inspection now before us was not involved in the case. The brake chain, furnished by the defendant company itself, was found to be insufficient in size and strength. The company sought to defend on the ground that it had provided a suitable person to test and inspect the chain. The Potter Case was not mentioned in the decision, and there was no occasion for referring to it. In *Van Dusen v. Letellier*, 78 Mich.

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492, 44 N. W. 572, the sole question was the duty of the defendants—lumbering manufacturers—to construct safe docks. Held, that the duty could not be delegated to an inspector. That decision has nothing to do either with the facts or the principle of this. *Smith v. Potter* was cited with approval and distinguished. MR. JUSTICE MORSE, who wrote the leading opinion, cast no doubt upon the *Potter* Case. The chief justice concurred in the result. JUSTICE CHAMPLIN concurred in reversing the judgment because in that case he did not think the duty of inspection could be delegated, while JUSTICE CAMPBELL dissented for errors upon the record. The only doctrine, therefore, established by that case is that the defendants could not delegate their duty to construct safe docks, so as to relieve themselves from liability. *Smith v. Potter* has been cited with approval by this court in the following cases: *Jarman v. Railway Co.*, 98 Mich. 135, 57 N. W. 32; *Brewer v. Railroad Co.*, 56 Mich. 627, 23 N. W. 440; *Hunn v. Railroad Co.*, 78 Mich. 513, 518, 41 Am. & Eng. R. Cas. 452, 44 N. W. 502, 7 L. R. A. 500; *Peterson v. Railroad Co.*, 67 Mich. 102, 31 Am. & Eng. R. Cas. 292, 34 N. W. 260; *Hewitt v. Railroad Co.*, 67 Mich. 61, 31 Am. & Eng. R. Cas. 249, 34 N. W. 659; *Illick v. Railroad Co.*, 67 Mich. 632, 35 N. W. 708; *Adams v. Iron Cliffs Co.*, 78 Mich. 271, 289, 44 N. W. 270; *Van Dusen v. Letellier*, 78 Mich. 492, 504, 44 N. W. 572; *Balhoff v. Railroad Co.*, 106 Mich. 606, 614, 65 N. W. 592; *McDonald v. Railroad Co.*, 108 Mich. 7, 65 N. W. 597. The judgment is affirmed. The other justices concurred.

Quirouet v. Alabama G. S. R. Co

QUIROUET

v.

ALABAMA G. S. R. Co.

(*Supreme Court of Georgia, July 12, 1900.*)

Injury to Employee—Using Standard in Mounting Car—Contributory Negligence.—An employee of a railroad company, who was injured in undertaking to mount a rapidly moving flat car by placing his foot upon the lid of the journal box, and seizing a standard which had been inserted in an opening in the side of the car in order to prevent the freight thereon from falling off, was not, either under the general rules of law or any Alabama statute, entitled to a recovery on the ground that the standard slipped in the socket and caused him to fall, when there was no testimony tending to show that the standard was placed on the car as a means of mounting the same, but, on the contrary, positive testimony that it was not placed there or intended to be used for that purpose.

Same—Selecting Dangerous Method.*—When an employee has his choice of two ways in which to perform a duty, the one safe, though inconvenient, and the other dangerous, he is bound to select the safe method; and if, instead of so doing, he elects to pursue the dangerous way, and is, in consequence, injured, he is guilty of such negligence as will bar an action for damages against the master. The principle here announced is recognized law in the state of Alabama.

Same—Same—Emergencies.—If there was, in the present case, any evidence tending to show that the plaintiff acted in an emergency, it was one of his own making, and the defendant company could not be held responsible on the theory that it had by its negligence placed him in such a position as to relieve him of the duty of exercising ordinary care for his own safety.

Directing Verdict.—The evidence demanded a verdict for the defendant, and there was no error in directing the jury to find accordingly.

(Syllabus by the Court.)

ERROR by plaintiff from Atlanta city court. *Affirmed.*

Westmoreland Bros., for plaintiff in error.

*See note at end of case.

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Dorsey, Brewster & Howell and *A. Heymans*, for defendant in error.

COBB, J. Quirouet brought suit in the city court of Atlanta against the Alabama Great Southern Railroad Company, a corporation chartered under the laws of the state of

Case Stated. Alabama, for damages for personal injuries alleged to have been brought about by the negligence of the defendant. At the trial the court directed a verdict for the defendant, and the plaintiff excepted.

The case, taken in its most favorable light for the plaintiff, will appear from the following summary of the evidence: The plaintiff testified that he was employed by the defendant as a flagman on one of its freight trains, and that, on the occasion on which he was injured, the train had entered a side track to let a passenger train pass. After the latter train had gone by, the freight train backed out from the side track onto the main line. "He had performed all he was required to do when he turned the switch to let the train back out." The train had a caboose attached, with steps to it. The plaintiff sought to mount the fourth car from the caboose. The brakes on this car, which the plaintiff had himself "put on," were causing the wheels to slide and smoke, and his purpose in mounting the car was to release the brakes. When brakes are on so tight as to cause the wheels to slide, there is danger of the wheels bursting, and thus causing the train to be wrecked. The journal box upon which he stepped was sometimes called the "grease box." The wheels of the car are fastened to the axle, and the wheel and the axle both turn. The axle passes through the journal box, which has a lid on it, placed somewhat like the roof of a house,—a little slanting. Grease and waste are put in the journal box to keep it from getting warm. There was no hand hold on the car, or other means provided for mounting this car. The train was running at the rate of five or six miles an hour. When the plaintiff attempted to mount the car, it was necessary for him to take hold of a large standard, which was on

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the car for the purpose of preventing the pipes with which the car was loaded from rolling off, and place his foot upon the journal box, and in this way mount. The standard was so large that he could not grasp it, but was required to throw his hand and wrist around it, and as he did so, and placed his foot upon the journal box, and threw his weight on the standard, it turned with him, threw him down, and threw his foot off the journal box under the wheels of the car, which passed over his ankle, foot, and leg, and caused him to sustain painful and serious injuries. The socket in which the standard worked was square, and the standard was round, and not properly fitted in it, or it would not have turned. The plaintiff further testified that it was the custom of the employees to mount the car in the way he sought to do, but there was no evidence showing that the company knew of this custom and assented to it. The defendant introduced in evidence a copy of one of its rules in force at the time the plaintiff was injured, which declared that the defendant's employees must not attempt to get on or off trains while in motion, and that, if they did so, it would be at their own peril and risk. Certain statutes of Alabama were introduced in evidence by the plaintiff, the following being so much of the same as are material to the present investigation: "When a personal injury is received by a servant or employee in the service or business of the master or employer, the master or employer is liable to answer in damage to such servant or employee, as if he were a stranger, and not engaged in such service or employment, in the cases following: When the injury is caused by reason of any defects in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal, point, locomotive engine, switch, car, or train upon a railway, or of any part of the track of a railway."

1. It is a general rule of law that a servant cannot recover

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of the master for injuries resulting from the use of machinery or appliances for a purpose for which they were not intended by the master, and for which it was not necessary that they should be used, however defective such appliances maybe. In undertaking to use an appliance for a purpose for which it was not intended by the master, the servant takes upon himself the risk incident to such use. Wood, Mast. & Serv. § 402; Bailey, Mast. Liab. p. 22; 1 Shear. & R. Neg. p. 346, and numerous cases cited in note 4; Hamilton v. Railroad Co., 83 Ga. 346; 9 S. E. 670; Railroad Co. v. Dickey, 90 Ga. 491, 16 S. E. 212; Railway Co. v. Reynolds, 93 Ga. 570, 20 S. E. 70. This rule is not contravened by the statute of Alabama above quoted, or any statute introduced in evidence, and it will be presumed that the general law on the subject is of force in that state. Applying this rule to the facts of the present case, we do not think the plaintiff would have been entitled to recover on the theory that the standard was defective. The standard was not placed on the car for the purpose of being used by employees in mounting the car. It was placed there to prevent the pipes from rolling off, and was suitable for this purpose. The fact that the standard was round, and did not fit the socket, which was square, is not a matter about which the plaintiff can complain, unless there was a necessity for him to use the standard for that purpose at that time in order to properly discharge the duties imposed upon him by the master.

2. There was, however, according to the evidence, no such necessity. The car he attempted to mount was the fourth car from the caboose, and the latter could have been easily and safely mounted by steps. This, therefore, was the safer and less dangerous method of reaching the brake which needed attention. Nor was it necessary for the plaintiff to remain at the switch until the caboose had passed, for he testified that he had per-

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formed all he was required to do when he turned the switch to let the train back out. While it was more inconvenient, still he could have reached the car by going first upon the caboose or other cars, which had appropriate appliances for use in going upon them, and it was his duty to have used the more appropriate and less dangerous method. In such a case, the use of the more dangerous method, even though it be the one of greater convenience, would preclude a recovery if injury results. This principle was recognized by the supreme court of Alabama in the case of *Railroad Co. v. George*, 94 Ala. 200, 10 South. 145, cited in *Railway Co. v. Harbin* (Ga.), 36 S. E. 218. In the Alabama case it was held: "If there are two apparent ways of discharging the required service, one more dangerous than the other, the employee is bound to select the latter, and is guilty of such negligence as will bar an action for damages if he selects the former, and is thereby injured."

3. If the locking of the wheel and consequent danger to the train, and the failure to mount the caboose or other cars with proper appliances for that purpose, brought about an emergency, it was one of the plaintiff's own creation, and he will not be allowed to take any advantage Same-Same-Emergencies. therefrom. See, in this connection, *Briscoe v. Railway Co.*, 103 Ga. 224, 28 S. E. 638.

4. We think there was no possible view of the case which would have justified a recovery for the plaintiff, but that his injuries were the result of his own gross Directing Verdict. negligence in the premises. There was therefore no error in directing the jury to return a verdict in favor of the defendant. Judgment affirmed. All the justices concurring.

NOTE.

Master and Servant—Choosing More Hazardous Way of Performing Duty.—See note to *Moore v. Kansas City, etc., Ry. Co.* (Mo.), 12 Am. & Eng. R. Cas., N. S., 580. See also *Bigelow v. Danielson*, 102 Wis. 470, 78 N. W. 599; *Foss v. Bigelow*, 102 Wis. 413, 78 N. W. 570;

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Greenville Oil & C. Co. v. Harkey, 20 Tex. Civ. App. 225, 48 S. W. 1005; Florida, C. & P. R. Co. v. Mooney (Fla.), 40 Fla. 17, 12 Am. & Eng. R. Cas., N. S., 721; Lehman v. Bagley, 82 Ill. App. 197; Railway Co. v. Estes, 37 Kan. 715, 16 Pac. 131; Railway Co. v. Tindall, 57 Kan. 719; Carrier v. Union Pac. Ry. Co. (Kan.), 17 Am. & Eng. R. Cas., N. S., 513; Lewis v. Simpson, 3 Wash. 641, 29 Pac. Rep. 207; Gowen v. Harley, 12 U. S. App. 574, 56 Fed. Rep. 973; Fritz v. Salt Lake & O. Gas & Electric Light Co., 19 Utah 493, 56 Pac. Rep. 90, 5 Am. Neg. Rep. 727; Erskine v. Chino Valley Beet-Sugar Co., 71 Fed. Rep. 270; Colorado Coal & I. Co. v. Carpita, 6 Colo. App. 248, 40 Pac. Rep. 248; St. Louis Bolt & I. Co. v. Burke, 12 Ill. App. 269; Richardson v. Carbon Hill Coal Co., 6 Wash. 52, 20 L. R. A. 338, 32 Pac. Rep. 1012; St. Louis Bolt & I. Co. v. Brennan, 20 Ill. App. 555.

JOHNSON

v.

CHARLESTON & S. RY. CO.

(*Supreme Court of South Carolina, Aug. 23, 1900.*)

Appeal—Res Judicata.—The affirmance of the judgment of the circuit court by an equal division of the supreme court on appeal therefrom was *res judicata* of the issue involved as to the case at bar.

Injury to Employee—Contract Releasing Master—Effect of Failure to Make Full Tender of Benefits.*—If a railroad employee has accepted benefits under a valid contract which stipulates that his voluntary acceptance of such benefits in case of injury is to operate as a release of the railroad from liability on account of the injury, he cannot escape from the contract because a full tender of all payments due under the contract has not been made to him.

APPEAL by plaintiff from Charleston county circuit court of common pleas. *Affirmed.*

W. St. Julien Jerry, for appellant.

Mordecai & Gadsden, for respondent.

*See *Petty v. Brunswick & W. Ry. Co. (Ga.)*, 16 Am. & Eng. R. Cas., N. S., 840, and *foot-note*; *Potter v. Detroit, G. H. & M. Ry. Co. (Mich.)*, 16 Am. & Eng. R. Cas., N. S., 264.

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JONES, J. This appeal is from a judgment for defendant in an action by an employee for damages for injury alleged to have been caused by defendant's negligence. The answer, with other defenses, set up a contract by plaintiff with the Relief Hospital Department of the

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Plant System, whereby, after injury, he received certain payments of money and other benefits, and, in consideration of such contract and acceptance of benefits thereunder, released defendant from liability for said injury. On the former trial, plaintiff demurred to the defense for insufficiency on the ground that said contract was contrary to law and against public policy. This demurrer was overruled, and on appeal from the order overruling the demurrer the judgment of the circuit court was not reversed. The members of the supreme court being equally divided on the question, the judgment of this court was that the judgment of the circuit court stands affirmed under the constitution. See 55 S. C. 152, 32 S. E. 2, 33 S. E. 174. On the trial thereafter, resulting in the judgment now appealed from, the plaintiff requested the circuit court, JUDGE GAGE presiding, to charge the jury as follows: "(8) The contract on which the affirmative defense of the defendant is based is contrary to public policy, and void. And no act of the parties can give vitality to a void contract, or satisfy the same. (9) If the acceptance of benefits under the hospital and relief department is a carrying out or ratification of the original agreement, it cannot avail as a defense when the original agreement is null and void. (10) The tender and acceptance of payments under the contract do not amount to an acquittance, unless such tender was in full of all claims under the contract." The first and second mentioned requests were refused, the court holding and charging that the effect of the overruling the demurrer by JUDGE WATTS and its affirmance by an equal division of the supreme court on appeal therefrom was to decide that the said contract was not void as against public policy, and that the defense, if proven, was a good defense, and that such question was *res judicata*. The request numbered 10, above, was refused on the ground that

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as, under the ruling of JUDGE WATTS, the contract set up was valid if plaintiff has accepted benefits thereunder, he is remitted to that contract for his remedy for full performance thereof.

We agree with the circuit court on both questions presented by this appeal. The first question is whether the affirmance of the judgment of the circuit court by an equal division of the supreme court on appeal therefrom is *res*
Appeal—Res
Judicata. *judicata* of the issue involved as to that case.

Article 5, § 12, of the constitution provides: "In all cases decided by the supreme court the concurrence of three justices shall be necessary for a reversal of the judgment below; but if the four justices equally divide in opinion the judgment below shall be affirmed, subject to the provisions hereafter prescribed." Then follow provisions for calling together the supreme court *en banc* in certain contingencies, not necessary to be mentioned, as no question arises thereunder in this case. As every judgment or order of the circuit court is the law of that case until reversed by a proper tribunal, and as by reason of the equal division of the supreme court on the question the circuit court was not reversed, but by reason of such division of the supreme court was affirmed, we think that there can be no doubt that the decision of the issue so made and affirmed is final for the purposes of that case. As it is not necessarily involved here, we express no opinion as to effect of such affirmance of an issue joined and decided below as a precedent for guidance in other cases involving the same or similar questions.

The next and only remaining question is whether there was error in refusing the tenth request above stated. This question is practically settled by the foregoing, for, if the contract set up in the answer is a valid contract, and plaintiff has elected to accept and has accepted benefits thereunder, he could not escape the contract of release, because a full tender of all payments due under the contract had not been made to him. By the contract and election to accept certain

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benefits and payments, he released the defendant from liability. The consideration for the release was the obligation or promise of the association to do certain things, and the release was not conditioned on full performance by such association. For full performance of the contract by the association the plaintiff, as correctly ruled below, has his remedy under the contract. See, on this point, *Petty v. Railway Co.* (Ga.), 35 S. E. 88. The judgment of the circuit is affirmed.

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v.

COLORADO FUEL & IRON CO. *et al.*

COLORADO FUEL & IRON CO.

v.

SOUTHERN PAC. CO. *et al.*

(*Circuit Court of Appeals, Eighth Circuit, April 16, 1900.*)

Interstate Commerce Commission—Power to Fix Rates.*—The order of the interstate commerce commission which the defendant railroad company was enjoined to obey was a void order, because the commission undertook to prescribe a maximum rate between points in different states, which it had no power under the interstate commerce act to prescribe directly, or indirectly by determining with reference to the past what was a reasonable rate and thereupon declaring that the rate should not be raised above that which it had adjudged to be reasonable.

Interstate Commerce—Power of Federal Courts to Fix Rates.—The fixing of rates for interstate carriers involves an exercise of legislative as distinguished from judicial power, and such power cannot be exercised by the federal courts directly, or indirectly by determining with reference to the past what was a reasonable rate and then enjoining a railroad from charging more in the future than it had found to be reasonable compensation in the past.

Interstate Commerce Commission—Power to Fix Rates.—The contention that the interstate commerce commission, when carriers have

*See *Behlmer v. Louisville & N. R. Co.* (C. C. A.), 9 Am. & Eng. R. Cas., N. S., 620, and *note*, p. 640.

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themselves established a rate between two points, may fix a rate to or from an intermediate point, by declaring that it shall be a certain proportion of the established through rate, is without merit.

Interstate Commerce—Fixing Rates—Validity of Restraining Order.—A clause of a restraining order of a court of equity merely repeating the general admonitions of the interstate commerce act will not be upheld, where it is not apparent that any special advantage would result from it, and such a clause cannot give any additional sanction to such statute.

Interstate Commerce—Reasonableness of Rates—Province of Court.—When an interstate freight rate that has been exacted or demanded is challenged on the ground that it was unreasonable or unjust, it is within the province of a court and jury to determine the issue so raised, and to redress the wrong, if one has been committed; but before an alleged unreasonable rate has been either paid or demanded on an actual tender of merchandise for shipment, it is not within the province of a court of equity to interpose and fix a maximum rate, and thereupon enjoin the carrier from demanding more than the rate so established.

APPEAL by a defendant from the circuit court of the United States for the district of Colorado. *Reversed.*

On October 28, 1898, the Colorado Fuel & Iron Company, a corporation of the state of Colorado, exhibited its bill of complaint in the circuit court of the United States for the district of Colorado against the Southern Pacific Company, a corporation of the state of Kentucky, and against numerous other railroad companies which did business in connection with it, for the purpose of preventing said railroad companies from putting in force freight rates on merchandise shipped from Pueblo, in the state of Colorado, to San Francisco and other points on the Pacific Coast, which were alleged to be extortionate and unreasonable. Relief was prayed on two grounds, and the bill consisted of two parts or counts. In the first count it was averred, in substance, that on February 18, 1895, the Colorado Fuel & Iron Company, the complainant below, was engaged at Pueblo, in the state of Colorado, in the manufacture and sale of steel rails and fastenings and other steel and iron products, but had been unable before that date to market

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its product at points on the Pacific Coast because the rate charged for transportation was unreasonable, the same being \$1.60 per hundred pounds; that complaint was made by it to the interstate commerce commission of the excessive rate charged as aforesaid between Pueblo and Pacific Coast points; that a hearing was had before said commission with respect to the matters complained of, which hearing resulted on November 25, 1895, in a decision by the commission that any rate on iron or steel products between Pueblo, Colo., and San Francisco, Cal., which was greater at any time than 75 per cent. of the rates contemporaneously in force on like traffic from Chicago to San Francisco, was unreasonable, and in violation of the interstate commerce act, and in an order by said commission to the effect that the defendants should put in force from Pueblo to San Francisco a rate not exceeding 45 cents per hundred on steel rails and fastenings, and 37 ½ cents per hundred on bar iron, cast iron, water pipe, billets, blooms, rivets, nails, and spikes, and that the rate from Pueblo to San Francisco on such iron and steel articles should never at any time be greater than 75 per cent. of the rates contemporaneously in force on like traffic from Chicago to San Francisco; that at the time said decision and order were promulgated by the commission the rate per hundred pounds from Chicago to San Francisco in car-load lots was 60 cents per hundred on steel rails and fastenings, and 50 cents on other steel and iron products; and that by said decision and order the rates from Pueblo to San Francisco were respectively made on the species of traffic aforesaid 45 cents and 37 ½ cents per hundred pounds. It was averred that on March 30, 1896, the interstate commerce commission filed a bill to compel the Southern Pacific Company and other defendants to comply with its aforesaid order, they having at first refused to do so; that during the pendency of said cause the rate prescribed by the aforesaid order of the interstate commerce commission was put in force, and had ever since been maintained, but that on October 17, 1898, the

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Southern Pacific Company had given notice that from and after November 7, 1898, the rate per hundred pounds on steel rails and fastenings from Pueblo to San Francisco would be advanced to 60 cents per hundred, and on other steel and iron products to 75 cents per hundred; and that the rates so proposed to be put in force were unreasonable and unjust, and would constitute an unlawful discrimination against the complainant, and in favor of all manufacturers of iron products east of Pueblo, and would exclude the complainant from the Pacific Coast market, and cause it great and irreparable loss and damage. In the second part of its bill all of the allegations of the first count were reaffirmed, and in addition thereto the following facts were averred: That from October 22, 1892, to June 2, 1896, the defendants had exacted a rate on iron products from Pueblo to San Francisco and other Pacific Coast points in the sum of \$1.60 per hundred, the distance being substantially 1,500 miles, while at the same time they only charged a rate of 60 cents per hundred on steel rails and fastenings, and 50 cents per hundred on other steel and iron products, from the city of Chicago to the same Pacific Coast points, the distance being substantially 2,500 miles, the conditions of transportation substantially the same, and the shorter route being included in the longer and a part thereof; that by so doing the defendants had charged complainant more than they charged other persons for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar conditions and circumstances, and had given an undue and unreasonable preference and advantage to particular persons, corporations, and localities, and had subjected the complainant and the city of Pueblo and its traffic to an undue and unreasonable prejudice and disadvantage, and had also charged a greater compensation in the aggregate for the transportation of a like kind of property under similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer haul, and had violated the interstate commerce act; that by

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reason of said wrongful acts the petitioner, who was the owner of large and productive iron and coal mines, and an extensive plant for making steel and iron products, had been compelled to restrict its manufacture thereof greatly below its capacity, and had been in effect excluded from Pacific Coast markets; that as to all Pacific Coast points except San Francisco the defendants had charged a rate of \$1.60 per hundred pounds from Pueblo since October 22, 1892; that on June 2, 1896, the defendants had put in force a tariff of 45 cents per hundred pounds on steel rails and fastenings, and of 37 ½ cents per hundred pounds on other steel and iron products, between Pueblo and San Francisco, the same being three-fourths of the rate from Chicago to San Francisco, and had ever since maintained the last-mentioned rate, to wit, three-fourths of the Chicago rate, as between Pueblo and San Francisco, the result being that the petitioner had been enabled to market its products on the Pacific Slope; and that the Southern Pacific Company was the owner of lines of railroads which enabled it to control the entrance of all the other defendant railroad companies into the city of San Francisco, and to dictate to the other defendants named in the bill the rates to be charged, and the divisions thereof, as respects Pacific Coast traffic. It was finally averred, as in the first count, that the Southern Pacific Company on October 17, 1898, had given notice of a proposed increase in rates, as heretofore stated, on iron and steel products, the same to become effective on November 7, 1898; "that in so advancing said rates said defendants will and are proposing and intending to make, as against this petitioner, an unjust and unreasonable charge, and will charge and demand a greater compensation for service to be rendered petitioner than they charge and receive from other persons for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, and give an undue and unreasonable preference and advantage to particular persons, corporations, and localities in Chicago and elsewhere east of

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said city, and their traffic, and subject petitioner and its traffic to undue and unreasonable prejudice and disadvantage and unjust discrimination, and will prevent the petitioner from having its interstate traffic moved by said defendants upon terms and conditions as favorable as those given by them for like traffic under similar conditions to other shippers, all in violation of said [interstate commerce] act." In view of the premises, the petitioner prayed for a mandatory injunction commanding the defendants to transport the petitioner's steel and iron products from Pueblo to San Francisco at the then existing rates, to wit, 45 cents per hundred pounds on steel rails and fastenings, and 37½ cents on other steel and iron products, and restraining them from cancelling or advancing such rates until further order, and that the petitioner be awarded a judgment against the defendants for the sum of \$100,000 for the damages theretofore sustained. A demurrer to the bill was interposed by the Southern Pacific Company, which was overruled on November 4, 1896. No answers having been filed, a decree *pro confesso* was subsequently entered. Subsequent proceedings were taken before a master to ascertain the amount of the complainant's damages, and after the master had filed his report recommending a decree for damages in the sum of \$35,300 the case came before the court for final hearing and decree. The court rejected the complainant's demand for damages, but awarded an injunction to the following effect: First, that the defendants be enjoined and restrained from further continuing to violate and disobey the interstate commerce act, and particularly to abstain from violating the order of the interstate commerce commission of November 25, 1895, the substance of which order has been heretofore stated; second, that the defendants be enjoined and required, in respect of complainant's traffic from Pueblo to San Francisco, Sacramento, Stockton, San Jose, Marysville, or Oakland, in the state of California, to cease and desist, on and after March 25, 1899, from unjust and unreasonable charges, or from demanding a greater compensation for service to be rendered complainant than they

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charge other persons for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, or from giving undue and unreasonable preference and advantage to particular persons, corporations, and localities at Chicago, Ill., and elsewhere eastward of said city, or from subjecting the complainant and its traffic to undue and unreasonable prejudice and disadvantage and unjust discrimination, or from preventing the complainant from having its interstate traffic moved upon terms and conditions as favorable as those given by them for like traffic under similar conditions to other shippers; and, third, that the defendants be required and commanded to move the interstate traffic of the complainant, on and after March 25, 1899, at the same rates charged and upon terms as favorable as those given by the defendants, under similar conditions, to any other shipper, to the end that they charge and demand from said complainant for transportation from Pueblo to San Francisco, Sacramento, Stockton, San Jose, Marysville, and Oakland, or from Pueblo to either of said points, on steel rails and railway fastenings, no more than 45 cents per hundred pounds, and on bar iron, cast iron, water pipe, pig iron, billets, blooms, rivets, or spikes no more than 37½ cents per hundred pounds. From the final decree so made the Southern Pacific Company prosecuted an appeal, and assigns error as respects the injunction. The complainant below also appealed, and assigns error as respects the disallowance of the damages assessed by the master.

Joel F. Vaile (*Edward O. Wolcott*, on the brief), for Southern Pac. Co.

David C. Beaman (*Fred. Herrington*, on the brief), for Colorado Fuel & Iron Co.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first paragraph of the restraining order which is quoted

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above in the statement, namely, that part of the order which requires the defendant company to comply with the order of the interstate commerce commission of date November 25, 1895, and in obedience thereto to transport steel and iron products from Pueblo, Colo., to San Francisco, Cal., for 45 cents and 37 ½ cents per hundredweight, and in no event to charge more than 75 per cent of the rate on similar products between Chicago and San Francisco, cannot be upheld consistently with the decisions of the supreme court of the United States in at least three cases, namely: Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243; Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184, 196, 16 Sup. Ct. 700, 40 L. Ed. 935; and Interstate Commerce Commission v. Alabama M. Ry. Co., 168 U. S. 144, 161, 18 Sup. Ct. 45, 42 L. Ed. 414. These decisions conclusively establish the proposition that the order

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of the interstate commerce commission which the defendant company was enjoined to obey was a void order, because the commissioner undertook to prescribe a maximum rate between Pueblo, Colo., and San Francisco, Cal., which it had no power under the interstate commerce act to prescribe directly, or indirectly by determining with reference to the past what was a reasonable rate and thereupon declaring that the rate should not be raised above that which it had adjudged to be reasonable. The order of the commission having been made without authority, it follows that so much of the restraining order is erroneous as seeks to put that order in force.

The third clause of the restraining order, which is quoted above in substance, in our judgment is also erroneous. In this paragraph of the restraining order the lower court, acting, no doubt, upon the allegations contained in the second part of the bill, which were admitted by the demurrer, undertook to do that which the interstate commerce commission had previously done; that is to say, prescribe a maximum rate

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of 45 cents and 37 ½ cents per hundred on steel and iron products between Pueblo and certain cities on the Pacific Slope. This seems to have been done by the court on the same theory as by the commission; that is to say, by determining with reference to past rates what was a reasonable charge, and then enjoining the defendant from charging more in the future than it had found to be reasonable compensation in the past. In the cases already cited the reasoning of the court by which it reached the conclusion that the interstate commerce commission has no power to fix maximum or minimum rates, either directly or indirectly, is founded upon the fundamental proposition that the fixing of rates for interstate carriers involves an exercise of legislative as distinguished from judicial power, and that the power does not belong to the commission, because it was not granted by the interstate commerce act. For much stronger reasons the power to fix a schedule of rates for interstate carriers does not belong to the federal courts, because congress has not attempted to delegate that authority to the courts, even if it could divest itself of that legislative function, and impose it upon the judicial branch of the government.

It is urged, however, in behalf of the complainant below, that although the interstate commerce commission is not empowered to fix either a maximum or minimum rate upon an independent consideration of what is a reasonable charge, yet, when carriers have themselves established a rate between two points, the commission may fix a rate to or from an intermediate point by declaring that it shall be a certain proportion of the established through rate. Upon this ground it is said that so much of the order of the commission of November 25, 1895, as made the rate from Pueblo, Colo., to San Francisco 75 per cent. of the rate from Chicago to San Francisco was valid, and may be upheld, although that portion of the order fixing an absolute rate of 45 cents and 37 ½ cents per hundredweight was void and in excess of its power. The decisions of the supreme court in Cincinnati,

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N. O. & T. P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935, and in Texas & P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940, are principally relied upon in support of this contention. With reference to this point it may be said that both of the cases last cited dealt mainly with the long and short haul clause contained in section 4 of the interstate commerce act (1 Supp. Rev. St. p. 530). In that clause of the act, congress, in the exercise of its legislative power to fix rates, has enacted "that it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance. * * *" In the first of the cases last cited several railroad companies, as the court found, had formed a joint through line between two points in different states over which merchandise was carried under through bills of lading. The rate charged to an intermediate point (Social Circle) on this joint line was 30 cents per hundred greater than the through rate for the longer distance, although the circumstances and conditions of the carriage were substantially the same. The action of the carriers in exacting a higher rate for the shorter distance was therefore in open violation of the rate prescribed by congress. The interstate commerce commission made an order commanding the carriers to desist from this violation of the law, and the supreme court affirmed this part of the order. In the second case above cited the commission had made and sought to enforce an order that freight received from abroad by water, and destined to an inland point under a through bill of lading from abroad, should be carried from the port at which it was received to the inland point at the same rate charged from such port to the inland point for other like freight of a domestic character. The supreme court declined

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to enforce this order of the commission, holding that the conditions under which the two classes of traffic were carried were dissimilar; that the dissimilarity of the conditions should have been considered by the commission, inasmuch as they might have been found to be of such a character as justified the carrier in transporting merchandise received from abroad to the inland point at a less rate than it charged on domestic or local traffic.

Considering the questions which were involved in these cases and the points adjudicated, we discover nothing therein which impairs the force of the later decisions in *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243, and in *Interstate Commerce Commission v. Alabama M. Ry. Co.*, 168 U. S. 144, 161, 18 Sup. Ct. 45, 42 L. Ed. 414, holding that the interstate commerce commission has not been vested with the legislative power to prescribe rates, either directly or indirectly. Prescribing a rate from Pueblo, Colo., to San Francisco, Cal., by reference to a rate that had theretofore been established by carriers between Chicago and San Francisco, involved the exercise of legislative functions to the same extent as fixing the rate between the former points on an independent consideration of what would be a reasonable compensation for the service. In either event, far-reaching questions of public policy arise, and many circumstances and conditions affect the question to be solved, so that it cannot be said that the problem of fixing a reasonable rate from Colorado points to the Pacific Slope became a simple one involving no exercise of legislative discretion, when it appeared that the carriers had established a rate from Chicago to Pacific Coast points. It must also be borne in mind that in the case in hand we are not called upon to deal with a joint through line, and with a rate to an intermediate point on that line, which, by the express command of congress, cannot be made greater than the through rate, if the conditions of carriage are substantially the same. No joint through line

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under a common control and management is disclosed by the present record. Besides, the commission by its order of November 25, 1895, did not enjoin that the rate for the short haul from Pueblo to San Francisco should not exceed the rate for the long haul from Chicago, but it went beyond that limit, and undertook to declare that the rate for the shorter distance should not exceed three-fourths of the rate for the longer distance, thereby assuming to establish a rate by relation. We feel constrained to hold that the commission exceeded its authority in this part of the order, and that it had no more power to fix a rate from Pueblo to San Francisco by relation to the theretofore existing rate from Chicago to San Francisco than it had to fix the former rate upon an independent consideration of what would be a reasonable charge.

It is further insisted by the complainant below that in view of the allegations contained in the second count of its bill, wherein threatened violations of the interstate commerce act

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merce—Fixing
Rates—Validity
of Restraining
Order.

are averred, it was entitled to injunctive relief on general equitable grounds; that is to say, because the damage to be apprehended from the threatened wrongful acts was incapable of being adequately redressed at law. It will be observed that by the second clause of the restraining order, which is quoted above in substance, the defendants were restrained from demanding unreasonable rates, from giving undue and unreasonable preferences to persons or localities, or from subjecting the complainant to an unreasonable disadvantage; etc. This clause of the order might possibly be upheld, but it is not apparent that any special advantage would result to the complainant from an order couched in such general terms, which merely repeats the general admonitions of the interstate commerce act. Such an order does not give any additional sanction to the statute; neither does it forbid the doing of any specific acts. It simply leaves the questions whether the threatened rate is reasonable, or whether it would operate as an undue preference or as an unreasonable discrimination, to

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be tried and determined in a proceeding for contempt before a chancellor, instead of being tried in the usual way before a court and jury, in an action for damages, after the rate has been exacted or actually demanded on a tender of property for shipment. Perceiving, apparently, that the general language of the order left all vital questions undetermined and open for consideration in supplementary proceedings, the trial court next addressed itself to the task of fixing a maximum rate to be thereafter observed, and in the third paragraph of the restraining order prescribed such a rate, and commanded the defendants to conform thereto. In so acting the trial court, in our opinion, exceeded its lawful powers. In the first instance interstate freight rates must be established and put in force by the carrier, or by the national legislature, or by some commission or administrative body on whom the authority to prescribe rates has been duly conferred by the national legislature. When the carrier promulgates a schedule of rates without previous conference with its patrons, it acts under the mandate of the statute and the common law that all rates must be fair and reasonable, and under and subject to the rule that it may be called to account by the shipper in an action at law for damages, provided any unreasonable or unjust rate or charge is either exacted from the shipper or demanded. When a rate that has been exacted or demanded is challenged on the ground that it was unreasonable or unjust, it is within the province of a court and jury to determine the issue so raised, and to redress the wrong, if one has been committed; but, before an alleged unreasonable rate has been either paid or demanded on an actual tender of merchandise for shipment, it is not within the legitimate province of a court of equity to interpose and fix a maximum rate, and thereupon enjoin the carrier from demanding more than the rate so established. Such an order effectually deprives an interstate carrier of its right to change and fix rates which is conceded to it by the interstate commerce act. It is tantamount both to making a contract between the shipper

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and the carrier, and to an exercise of the legislative power of prescribing rates, neither of which powers properly belongs to a court of equity. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 493, 17 Sup. Ct. 896, 42 L. Ed. 243; *Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 196, 197, 16 Sup. Ct. 700, 40 L. Ed. 935; *Express Cases*, 117 U. S. 1, 29, 6 Sup. Ct. 542, 628, 29 L. Ed. 791; *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 685, 686, 4 Sup. Ct. 185, 28 L. Ed. 291; *Pullman Palace-Car Co. v. Missouri Pac. Ry. Co.*, 115 U. S. 587, 598, 6 Sup. Ct. 194, 29 L. Ed. 499; *Little Rock & M. R. Co. v. St. Louis S. W. Ry. Co.*, 27 U. S. App. 380, 387, 11 C. C. A. 417, 63 Fed. 775; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co. (C. C.)*, 41 Fed. 559, 563.

Aside from the foregoing considerations, we perceive no reason why the remedy at law for the threatened wrong should be pronounced ineffectual or inadequate. The damages that the complainant will sustain if it is right in its contention as to the unreasonableness of the proposed rates can be ascertained by a court and jury, while it is not suggested that the defendant company is insolvent, or that it will be unable to respond for such damages as a jury may assess. Besides, a single verdict before a jury establishing the unreasonableness or discriminating character of the proposed rate would probably lead to a withdrawal of the rate, and avoid the necessity of further actions. But, be this as it may, we are of opinion that so much of the restraining order from which the appeal is taken as afforded any substantial relief to the complainant company, namely, that part thereof which prescribed a maximum rate, and enjoined the defendant company from demanding greater compensation, was in excess of the power of the court, and cannot be upheld. It may well be that the interstate commerce act would be much more effectual in accomplishing the objects which it was designed to accomplish if the commission provided for therein was empowered to prescribe a schedule of maximum rates in cases

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like the one in hand. But that power, it seems, has not been conferred, and the courts cannot enlarge the authority of the commission by enforcing orders of that body which it has no power to make. Neither can the courts undertake to name a maximum rate in advance, and enjoin a carrier from violating it.

There were some other questions of a jurisdictional nature discussed at the bar, but we have not deemed it expedient or necessary on the present occasion to examine them critically, and accordingly shall express no opinion thereon. In view of what has been said we conclude that the decree below should be reversed, with directions to dismiss the bill of complaint; and it is so ordered.

MISSOURI, K. & T. RY. CO. *et al.*

v.

BYRNE.

(*Circuit Court of Appeals, Eighth Circuit, February 12, 1900.*)

Carriers of Live Stock—Defective Cattle Pens—Escape of Cattle—Collision with Train—Pleading—Causes of Action—Election.—The first count of the complaint charged that the damages were inflicted by the negligence of the defendant railroad in constructing and repairing its cattle pens, and the second charge that they were inflicted by the negligence of the company in running its engine upon the cattle after they had escaped from the pens, and while its engineer might have seen them upon the track, and might have prevented the collision. *Held*, that there was no inconsistency between the causes of action set forth in the two counts of the complaint, and the motion to compel an election between them was properly denied.

Witnesses—Death of Agent—Competency of Other Party.—There is no statute or rule of law in force in the Indian Territory which makes a party to a contract or a transaction incompetent to testify to it because the agent of the principal with whom he made or had it is dead.

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Carriers of Live Stock—Cattle Pens—Liability of Railroad.*—A railroad company permitting stock to be placed in the pens which it has prepared by the side of its tracks to facilitate loading and unloading does not thereby receive it for shipment, or take possession or assume charge of it as a common carrier or keeper; and its only responsibility in this connection is for the exercise of ordinary care in the construction and maintenance of its pens.

Same—Same—Death of Escaped Cattle from Collision with Train—Proximate Cause—Question for Jury.—The jury found that the bunching of 19 cattle on the railroad track at night, at a point where they could have wandered off on the prairie, and their death from collision with an engine and train of cars was not the natural and probable consequence of the failure of the railroad company to use ordinary care to maintain its cattle pens, from which such cattle escaped. *Held*, that such finding could not be disregarded by the court, and was conclusive.

ERROR by defendant to the United States court of appeals in the Indian Territory. *Reversed*.

Clifford L. Jackson, for plaintiffs in error.

N. B. Maxey (*G. B. Denison*, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. On December 20, 1892, the assignors of Patrick J. Byrne, the defendant in error, were notified by the agent of the Missouri, Kansas & Texas Railway Company that it would furnish cars to ship their cattle the next morning, and that he should "bring his cattle in." Thereupon he drove them in, and put them in pens, at the station of Eufaula, which the railway company had constructed and maintained to facilitate the loading, unloading, and shipment of cattle. During the night the cattle broke down two posts and a corresponding portion of the fence, and 150 of them escaped from one of the pens. Nineteen of them were killed on or near the railroad track

*See *St. Louis, etc., Ry. Co. v. Law* (Ark.), 18 Am. & Eng. R. Cas., N. S., 286, and *note*, p. 292; *Missouri, etc., Ry. Co. v. Byrne* (Ind. Terr.), 13 Am. & Eng. R. Cas., N. S., 17, and *note*, p. 28.

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by an engine which ran into them, 94 were recovered, and possibly 37 were lost. The defendant in error sought to recover for the cattle lost and killed, for the injury to those recovered, and for the expense of recovering them.

In the complaint upon which the action was tried there were two counts, each for the recovery of the same items of damages, which amounted in the aggregate to \$1,802.50. The first count charged that these damages were inflicted by the negligence of the company in constructing and repairing its cattle pens, and the second charged that they were inflicted by the negligence of the company in running its engine upon the cattle after they had escaped from the pens, and while its engineer might have seen them upon the track, and might have prevented the collision. The court thereupon charged the jury, in effect, that, if they found that the railway company was negligent in the construction or maintenance of its cattle pens, they might return a verdict against it for such loss of the defendant in error as was the direct, natural, and proximate effect of that negligence; that the direct, natural, and proximate effect of a given cause was that effect which persons of ordinary judgment might reasonably conclude would follow such a cause as a result thereof; that, if the killing of the 19 cattle on the railroad tracks was the direct, natural, and proximate result of the negligence in maintaining the cattle pens, they should return a verdict for the cattle so killed, under the first count of the complaint; but if that killing was not the direct, natural, and proximate effect of that negligence, but was caused solely by their collision with the engine, then they could not return a verdict for the dead cattle under the first count of the complaint, but might do so under the second count, if they found that the railway company failed to exercise ordinary care in running the engine and train which struck them. The jury returned a verdict under the first count of the complaint for \$743, and under the second count for "19 cattle killed by train, at \$25 per head, amounting to \$475." In other words, the jury found that the killing of the 19 cattle by the engine on the railroad

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tracks was not the natural or probable effect of a failure to exercise ordinary care in the construction of the cattle pens, but that its proximate cause was the collision of the engine with them.

There are numerous assignments of error. Some of them are that the court refused at the close of the trial to instruct the jury to return a verdict for the plaintiff in error upon the first count of the complaint; that it refused to instruct them to return a verdict in favor of the railroad company upon the second count of the complaint; that it denied the motion of the railway company to compel the defendant in error to elect upon which count he would proceed to trial; that it permitted Grayson, who had the transaction with the agent of the company, to testify to the conversation between them which induced him to put the cattle in the pens, although the agent was dead; and that the court refused to instruct the jury that the railway company did not receive the cattle for shipment, or take possession or assume charge of them by permitting them to be placed in the pens.

There was no inconsistency between the causes of action set forth in the two counts of the complaint, and the motion to compel an election was properly denied. Both causes

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Train—Plead-
ing—Causes of
Action—Elec-
tion.

were based on the negligence of the company, and none of the facts essential to the maintenance of either cause were inconsistent with those that were indispensable to the maintenance of the other. *Great Western Coal Co. v. Chicago G. W. Ry. Co. (C. C. A.)*, 98 Fed. 274.

There is no statute or rule of law in force in the Indian Territory which makes a party to a contract or a transaction incompetent to testify to it because the agent of the principal with whom he made or had it is dead, and there was no error in the admission of the testimony of Grayson. *Rev. St. § 858; Mansf. Dig. Ark. § 2857.*

Witnesses—
Death of Agent—
Competency of
Other Party.

It is undoubtedly a sound legal proposition that a railway company which permits stock to be placed in the pens which

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it has prepared by the side of its tracks to facilitate loading and unloading it does not thereby receive it for shipment, or take possession or assume charge of it as a common carrier or keeper. The limit of its liability is for the exercise of ordinary care in the construction and maintenance of its pens. But we hesitate to say that this proposition was not substantially given to the jury, although not in the words of the request of the company, and perhaps not as clearly and incisively as it might have been.

Carriers of Live
Stock—Cattle
Pens—Liability
of Railroad.

There is, however, one assignment of error which must be sustained, and which renders a more extended notice of others unnecessary. It is that the court refused to instruct the jury that they must return a verdict for the railway company upon the second cause of action. The sole basis of that cause of action was the negligence of the engineer in running his train upon and killing the 19 cattle on the railway tracks, and the jury returned a verdict against the company for \$475 on this account. A careful perusal of the entire record fails to disclose any evidence of negligence or dereliction of duty in the operation of the train which killed these cattle. They were bunched on the railroad track some distance from any station, in the night, when a train came along and struck them. The proof is plenary and undisputed that the engineer in charge of the train was watchful, active, and careful, and that after he discovered the cattle it was impossible for him to avoid a collision. In this state of the case the court should have instructed the jury that there could be no recovery on this cause of action. It is contended that this error is not fatal, because the killing of the cattle may be attributed to the negligence of the company in the construction and maintenance of its pens, which permitted the escape and the killing. It is said that there would have been no killing if there had been no escape, and no escape if there

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Death of Escaped
Cattle from Col-
lision with Train
—Proximate
Cause—Question
for Jury.

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had been no negligence in maintaining the pens. But this contention ignores the real question in the case, and also the pregnant fact that the verdict of a jury has properly answered that question adversely to the major premise of the argument. The question was whether or not the negligence of the company in maintaining its cattle pens was the proximate cause of the killing of the 19 cattle on the railroad track by the engine. The mere fact that they would not have been killed if they had not escaped does not answer this question, for they would not have been killed although they did escape if they had not bunched themselves on the railroad track, or if the train had not come along and struck them at the exact moment when they were on the track and in its way. *Post hoc* is not necessarily *propter hoc*. The question was whether the killing by the engine was the natural and probable result of the negligence in the maintenance of the pens, not whether it was subsequent to that negligence, nor whether it would not have occurred in the absence of that negligence. An injury that is the natural and probable consequence of an act of negligence is actionable because that act is its proximate cause, but an injury that could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and that would not have resulted from it, but for the interposition of some new, independent cause that could not have been anticipated. The question, then, was whether the bunching of the 19 cattle on the railroad track in the night, and their death from collision with an engine and train of cars, was the natural and probable consequence of the failure of the company to use ordinary care to maintain its cattle pens. It was whether that bunching and killing could have been foreseen or reasonably anticipated as the natural and probable effect of negligence in maintaining the pens. A natural consequence of an act is one which ordinarily follows from it,—the result which may be reasonably anticipated from it. Was the bunching and

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killing of the cattle on the railroad a result which ordinarily follows from their escape upon unfenced land through which a railroad extends? A probable consequence is one which is more likely to follow its supposed cause than it is to fail to follow. Was it more probable that the result of the escape of these cattle would be their bunching and killing on the railroad than it was that they would wander off on the prairie, and be recovered again, as 94 of them were? To ask these questions seems to answer them, and the jury gave the answers which they seem to demand. They answered them in the negative. They found that the killing of these 19 cattle was not the natural and probable consequence of the failure to use ordinary care to maintain the pens, but that it was the result of an independent intervening cause,—the bunching of the cattle on the railroad, and the collision of the engine with them. Unless this court reverses, ignores, or disregards that finding, the verdict for the cattle killed cannot be sustained on the ground that the killing was the effect of negligence in maintaining the pens, because the jury have found that this negligence was not the proximate cause of the killing or of the loss which resulted therefrom. But this finding may not be disregarded unless all reasonable men of unprejudiced minds would draw the opposite conclusion from the facts of this case. It is only in such a case that the question of proximate cause may be withdrawn from the jury. In every other case it is their province to determine it, and their finding upon it is conclusive. MR. JUSTICE STRONG, in *Railway Co. v. Kellogg*, 94 U. S. 474, 476, 24 L. Ed. 259, said:

“The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. * * * In the nature of things, there is in every transaction a succession of events more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence,

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or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

Insurance Co. v. Robbins' Adm'r, 27 U. S. App. 547, 552, 553, 12 C. C. A. 544, 547, 65 Fed. 178-181, 27 L. R. A. 629; *Railway Co. v. Callaghan*, 12 U. S. App. 541, 547, 6 C. C. A. 205, 208, 56 Fed. 988, 991; *Railroad Co. v. Price*, 97 Fed. 423, 38 C. C. A. 239.

We are far from being convinced that all reasonable men of unprejudiced minds would disagree with the finding of the jury upon this question of proximate cause. Indeed, it seems to us that many reasonable men would agree with the jury that the bunching of these 19 cattle on the railroad track, and their killing by the engine and train, was neither the natural nor probable consequence of the negligence in maintaining the cattle pens; that such a result could not have been foreseen or reasonably anticipated from that negligence, or from the escape of the cattle from the pens; and that it was not the natural or probable consequence of that negligence or escape, but was the effect of independent intervening causes,—the bunching of the cattle on the railroad track, and the coming of the train in the night at the exact moment when they happened to be in its way,—causes which could not have been foreseen or anticipated, but which unexpectedly intervened, turned aside the natural sequence of events, and produced an unnatural and improbable result. *Railway Co. v. Elliott*, 12 U. S. App. 381, 386, 5 C. C. A. 347, 349, 55 Fed. 949, 20 L. R. A. 582.

Since the jury properly found, upon substantial evidence, that the negligence of the company in constructing and maintaining the pens was not the proximate cause of the loss of the cattle killed, but that the proximate cause of that loss was negligence in operating the engine, and since there was no evidence of any negligence in the operation of the engine, the verdict cannot be sustained. The rulings and proceedings in this case prior to the trial are not the subject of any assignment of errors, and hence we do not notice them.

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The judgments of the United States court of appeals for the Indian Territory and of the United States court for the Indian Territory are reversed, and the case is remanded to the latter court, with instructions to grant a new trial.

CALDWELL, Circuit Judge (dissenting). It is stated in the opinion of the court that "in the complaint upon which the action was tried there were two counts. * * * The first count charged that these damages were inflicted by the negligence of the company in constructing and repairing its cattle pens, and the second charged that they were inflicted by the negligence of the company in running its engine upon the cattle after they had escaped from the pens." It is necessarily implied in this statement that the plaintiff, by his own volition, stated his cause of action in two counts. But the record in the case discloses that he did nothing of the kind. More than seven years ago the plaintiff's assignor delivered to the defendant railroad company 150 head of cattle for shipment over its road. The company placed the cattle in one of its cattle pens for shipment, from which they escaped during the night by reason of the fence around the pen being old, rotten, and defective. It is the view of the majority of the court that the company was negligent in putting the cattle into a pen so defectively fenced, and that it is liable for the cattle that escaped from the pen, and which, by reason of such escape, were lost to the plaintiff.

The original complaint counted on the foregoing facts, and alleged that when near the pen from which the cattle escaped, and immediately after their escape, "a locomotive engine and train of cars ran into, against, and over a large number of the said cattle, and killed of them nineteen head, of the value of \$475, and scattered and dispersed others of said cattle, so that forty head thereof have been totally lost to the plaintiff, which were of the value of \$1,000." This complaint stated but a single cause of action, namely, the loss of the 40 head of cattle by reason of their escape from a defective stock pen. The statement was incidentally made that, of the 40 head lost, 19 head were run over by a locomo-

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tive engine while fleeing from the pen and in close proximity to it, and the remainder of the 40 head continued their flight out onto the plains, and were lost.

Obviously, an allegation that the 40 head of cattle were lost to the plaintiff by reason of their escape from the shipping pen would have constituted a good complaint. But seizing upon the incidental and wholly immaterial statement of what happened to the cattle after their escape from the shipping pen, which prevented the plaintiff from recovering them, the defendant's attorney flooded the court with demurrers, and motions for a more specific statement of the cause of action, and for a separate statement of the causes of action, and with numerous other frivolous and nameless motions, until the court, to obtain surcease from this flood of trash, required the plaintiff to divide his single cause of action into two, one paragraph counting on the cattle that were killed by the locomotive engine in their flight from the pen, and the second counting on the cattle that were not killed by the locomotive engine, but continued their flight onto the plains and were never recovered. After thus coercing the plaintiff to state in a separate paragraph the number of cattle killed by the locomotive engine as they fled from the pen, the defendant then insisted the plaintiff must show these cattle were killed through the negligent management of its locomotive engine, and that as to these cattle the plaintiff must rest alone upon that claim of negligence; thus ignoring the plain and obvious fact that it was the defendant's negligence in allowing the cattle to escape from the pen and get on the railroad track that was the proximate cause of the loss, and that their death on the railroad track was due to this proximate cause, and that it was therefore wholly immaterial to the plaintiff's right of recovery how the defendant's engine that ran over the cattle after their escape from the pen was managed. After inducing the court erroneously to compel the plaintiff against his protest to split his single cause of action into two, another shower of frivolous demurrers and motions was rained down upon the court;

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among them, a motion that the plaintiff be compelled to elect upon which of the two causes of action he would stand. Against this extremely erroneous ruling of the trial court the plaintiff was remediless. He could not take an appeal from the order requiring him to change the statement of his cause of action, because it was not a final judgment. He was therefore compelled to try the case upon the statement of his cause of action framed, in effect, by the defendant to defeat the ends of justice. The defendant now seeks to saddle upon the plaintiff the consequences of an error procured and brought about by its own action. By the quibbling methods mentioned, the proper characterization of which would justify the use of very strong adjectives, the defendant succeeded in delaying the trial of the case for nearly four years. When the case was finally tried, the jury was required to return two verdicts,—one for the cattle killed by the locomotive engine, and one for the cattle that continued their flight onto the plains and were lost. The jury returned verdicts as follows: "For thirty-seven head of cattle never recovered, but not killed by the train, at \$12.50 per head, amounting to \$462.50;" "for nineteen cattle killed by train, at \$25.00 per head, amounting to \$475." In all common sense and reason, there never was but one cause of action in this case; that was for the cattle lost, no matter how, by reason of their escape from the defective cattle pen. The division of this single cause of action into two was brought about by the persistent efforts of the defendant, and is therefore an error from which it can reap no benefit. It invited the error against the protest of the plaintiff, and no party can take advantage of an error he himself invites and procures to be committed. *New York El. R. Co. v. Fifth Nat. Bank*, 135 U. S. 432, 441, 10 Sup. Ct. 743, 34 L. Ed. 231, and cases there cited; *Railway Co. v. Harris*, 27 U. S. App. 450, 457, 12 C. C. A. 598, 63 Fed. 800, and cases there cited.

It must be conceded that, if none of the cattle that escaped from the pen had been killed by the defendant's locomotive

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engine, it would have been liable for all that were lost by reason of such escape,—all that were lost as the proximate cause of the escape from the pen. Upon what principle, then, can the company be relieved from this liability by showing that in their flight from the pen, and immediately after their escape therefrom, and by reason thereof, the cattle ran upon the company's track, and were killed by one of its locomotive engines, without any negligence in the management of the locomotive? The plaintiff brought his action properly, namely, for the loss of the cattle resulting from their escape from the cattle pen through the negligence of the defendant. The manner of their death, or loss after their escape from the pen, so be it that it was a result of that negligent escape, is wholly immaterial. Some may have run upon the railroad track, and been killed by a moving locomotive; some may have run into a wire fence, and been killed; and some may have continued their flight upon the plains, and never been recovered. But in each case their loss to the plaintiff was the result of the defective pen; that was the proximate cause of the loss of all the cattle that were lost. The first complaint which is in the record counted on this state of the case. The escape of the cattle from the pen was so clearly and obviously the proximate cause of their loss to the plaintiff that the question should not have been submitted to the jury. The verdict of the jury expressed a just and the proper result, and was clearly the only verdict possible, if the case had been tried, as it should have been, on the plaintiff's complaint, instead of on one framed for him by the defendant. The question of the sufficiency of the evidence to support the finding as to the number of cattle that fled out upon the plains and were lost ought to be regarded as settled after the jury that tried the case, the trial judge, and an appellate court of three judges have concurred in its sufficiency. It is a well-settled rule, essential to a fair and just administration of justice, that where, from a view of the whole record, it is apparent that justice has been done, an appellate court will not reverse the judgment for mere formal defects. *Lancaster v. Collins*,

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115 U. S. 222, 227, 6 Sup. Ct. 33, 29 L. Ed. 373, and cases there cited. "When it is manifest that the judgment is right on the whole record, the judgment will be affirmed, notwithstanding error in the proceedings." *Vaughan v. Daniels*, 98 Mo. 230, 11 S. W. 573; *Fairbanks v. Long*, 91 Mo. 628, 4 S. W. 499. Much more is this the rule where, as in this case, the error in the proceedings complained of is the result of the action of the party complaining of those proceedings. "When the judgment is for the right party it will not be reversed for any error of law attributable to the complaining party's action." *Fairbanks v. Long*, 91 Mo. 628, 4 S. W. 499; *Noble v. Blount*, 77 Mo. 239; *Holmes v. Braidwood*, 82 Mo. 617. "A party shall not tread back, and trip up the heels of the plaintiff on a defect which he himself invited." *Holmes v. Braidwood*, 82 Mo. 617. "A party will not be heard to complain of an error adopted by the trial court at his request." *Price v. Town of Breckenridge*, 92 Mo. 387, 5 S. W. 22.

The only question of law in the case from the beginning to the end, worthy of the attention of the court, was whether the company was bound to provide a reasonably safe shipping pen for the cattle, and was liable for the damage resulting from the neglect of that duty. By means of the groundless quibbles mentioned, the defendant has protracted this simple case for seven years, and the plaintiff is now told at the end of that time that he can have nothing for the cattle that escaped and were killed by the locomotive engine, as they were running from the pen, because that was not negligently managed. To that he naturally returns the answer: "I sued for the loss of my cattle resulting from their escape from the shipping pen by reason of the defendant's negligence in not maintaining a reasonably safe and sufficient fence around the pen, and I neither know nor care whether the defendant's locomotive engine which killed some of them as they fled from the pen was well or ill managed. Their escape from the pen was the proximate cause of their loss to me, and it is for that I sued. The statement in the pleadings to the contrary of this was compelled by an order of the court

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made on the defendant's motion, and against my protest, and for that reason cannot operate to my prejudice." This plea is not answered in the majority opinion, and cannot be answered. The result reached by the court is not right or just. It rewards a species of practice intended to delay and defeat the ends of justice. It is, in a word, a travesty on justice. Moreover, under the Arkansas Code of Practice which is in force in the Indian Territory, it is well settled that, if the proofs warrant the verdict, the judgment will not be set aside or reversed, but the complaint will be treated and considered as amended to conform to the proofs. In *Davis v. Goodman*, 62 Ark. 262, 35 S. W. 231, CHIEF JUSTICE BUNN, delivering the unanimous judgment of the court, said: "But, according to a uniform holding of this court, the trial court's findings and judgment will not be reversed, when they are in conformity to the evidence in the case, notwithstanding the pleadings fall short of the facts in evidence; for in such case the pleadings will be considered as amended to suit the facts." And see, to the same effect, *Keener v. Baker*, 35 C. C. A. 350, 93 Fed. 377; *Railway Co. v. Harper*, 44 Ark. 527; *Railway Co. v. Triplett*, 54 Ark. 289, 305, 15 S. W. 831, 16 S. W. 266. But here there is a perfectly good complaint in the record to which the evidence can be referred. But, clearly, the reversal of the judgment of the lower court should be accompanied by an instruction to the trial court to permit the plaintiff, if so advised, to state his cause of action in a single count based on the loss of the cattle by reason of their escape from the defectively fenced cattle pen, as was done in the original complaint, and requiring the defendant to plead to the merits of such complaint, for, judging from the disclosures of the record before us, in no other way will the merits of the case be reached during the lifetime of any of the natural persons connected with it. The railroad company, being exempt from the natural law of mortality, will alone see the end of the case. The judgment of the United States court of appeals in the Indian Territory (49 S. W. 41) should be affirmed.

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COONEY

v.

PULLMAN PALACE-CAR CO.

(*Supreme Court of Alabama, April 18, 1899.*)

Sleeping-Car Companies—Loss of Passenger's Property—Liability.*—While a sleeping-car company is not liable as a common carrier or as an innkeeper for the loss of its passenger's baggage, it is its duty to use reasonable care to guard its passengers from theft; and if, through want of such care, the personal effects of a passenger such as he might reasonably carry with him are stolen, the company is liable for their value.

Case at Bar.—In an action against a sleeping-car company for the loss of its passenger's personal effects, plaintiff's evidence made a *prima facie* case in his behalf, and defendant's evidence did not overcome this *prima facie* case by showing the exercise of reasonable care for plaintiff's property. *Held*, that defendant was responsible for the loss.

Sleeping-Car Companies—Loss of Baggage—For What Articles Responsible.—In such an action a sleeping-car company can be held responsible for clothing, ornaments, and such articles as are usually carried by travelers in their hands, together with a sum of money sufficient for the expenses of the journey in which one is engaged; and, therefore, it may be held liable for the value of mileage tickets belonging to a passenger having much traveling to do, and for the value of opera glasses, a compass, a razor and strap and accoutrements and a nasal syringe; but not for the value of a pistol.

Same—Same—Measure of Damages.—In such an action the measure of damages, where it is not shown that the articles lost had a market value, is the actual loss sustained by the passenger by being deprived of articles specially adapted to his use.

APPEAL by plaintiff from Birmingham city court. *Reversed.*

John W. Tomlinson, for appellant.

Walker, Porter & Walker, for appellee.

*See *Pullman's Palace-Car Co. v. Hall* (Ga.), 14 Am. & Eng. R. Cas., N. S., 229, and *foot-note*.

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DOWDELL, J. In the recent case of *Car Co. v. Adams*, 24 South. 925, decided by this court, it was said: "The rule now seems to be well settled that sleeping-car companies are not held to the responsibility of common carriers and inn-keepers. Many reasons for this distinction will be found stated in the text-books and decisions, and nowhere more fully, perhaps, than in *Blum v. Car Co.*, 1 Flip. 500, Fed. Cas. No. 1,574,"—citing *Hutch. Carr.* 617d; 22 Am. & Eng. Enc. Law 797, where the authorities may be found collated. The writer of this opinion is, however, not very profoundly impressed with the soundness of reasoning in the case of *Blum v. Car Co.*, *supra*. In the case above referred to of *Car Co. v. Adams*, the case of *Lewis v. Car Co.*, 143 Mass. 267, 9 N. E. 615, is cited with approval, wherein it was said by MORTON, C. J.: "A sleeping-car company holds itself out to the world as furnishing safe and comfortable cars, and, when it sells a ticket, it impliedly stipulates to do so. It invites passengers to pay for, and make use of, its cars for sleeping; all parties knowing that, during the greater part of the night, the passengers will be asleep, powerless to protect himself or to guard his property. He cannot, like the guest of an inn, by locking the door, guard against danger. He has no right to take any such steps to protect himself in a sleeping car, but, by the necessity of the case, is dependent upon the owners and officers of the car to guard him and the property he has with him from danger from thieves or otherwise. The law raises the duty on the part of the car company to afford him protection. While it is not liable as a common carrier or as an inn-keeper, yet it is its duty to use reasonable care to guard the passengers from theft; and if, through want of such care, the personal effects of a passenger such as he might reasonably carry with him are stolen, the company is liable for it. Such a rule is required by public policy, and by the true interests of both the passengers and the car company, and the decided weight of authority supports it."

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It becomes a question in the present case as to whether the defendant car company exercised reasonable care to guard and protect plaintiff's property from loss, by theft or otherwise, while a passenger in defendant's sleeping car. The evidence on the part of the plaintiff made a *prima facie* case in his behalf. Does the evidence of the defendant overcome this *prima facie* case by showing the exercise of that reasonable care for plaintiff's property that he was entitled to, and such as would exempt the defendant from liability? Case at Bar.

The first witness introduced by the defendant was Cartwright, the waiter, who took plaintiff's hand baggage when he entered the sleeping car. The testimony of this witness coincides with plaintiff's as to the manner of plaintiff's entering the car, and the disposition of his satchels, except as to the particular place where Cartwright deposited the satchels in the car; and we think, under the circumstances, this was an immaterial conflict. The other two witnesses of the defendant,—the car conductor and the porter,—testified that the car was under the control of the conductor, porter, and waiter, and that it was not customary or usual to have any more persons in control of a sleeping car; that it is the duty of each of these three employees to guard and watch said car at all times, some one to be on guard at all times; that some one of these employees was on guard and watch all that night; that while on guard he could see the full length of the aisle in the car, and between all the berths on the right and left sides; that no person boarded or left said car between Mobile and Montgomery; and that several people got out of said car at Montgomery, some of them having valises in their hands as they got off the car, though none of the employees knew of the satchel being lost until plaintiff inquired for the same above Montgomery, when he got up out of his berth.

It is evident from the testimony that the satchel was stolen or lost, and it was not stolen or lost between Mobile and Montgomery; but it is a fair and reasonable inference from the

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testimony that it was stolen or lost upon the arrival of the train at Montgomery. These last two witnesses tell of the duties of the employees, and in a general way how they are and were performed, and yet they wholly fail to show what care, if any, was exercised at Montgomery, where a number of passengers got off said car, some with satchels in their hands, to prevent a theft, or the taking of plaintiff's satchel, through mistake, by any one of those leaving the car. The witness Cartwright knew plaintiff's satchel, for he remembered it, and could describe it at the time of the trial of this case. He was evidently up and present at the time the several passengers left the car at Montgomery, for he says that the person who occupied the lower berth beneath the one occupied by plaintiff left the car in a few minutes after the train reached Montgomery. Neither of the defendant's witnesses says that the plaintiff's satchel was or was not taken away by some one of the persons who left the car at Montgomery with satchels in their hands; nor do they pretend to say that they, or either of them, exercised any care whatever in this regard. Can it be denied that reasonable and proper care on the part of defendant's employee, Cartwright, who knew plaintiff's satchels, would have prevented its loss through any one of those leaving the car at Montgomery? After a careful and fair consideration of defendant's evidence, we do not think it shows that reasonable exercise of care and protection to the plaintiff and his property that the law requires.

The next question is as to what articles of the property lost the defendant should be held liable for. The rule as laid down in the case of *Car Co. v. Adams, supra*, supported by the authorities cited in that case, seems to limit the responsibility of the car company to the clothing, ornaments, and such articles as are usually carried by travelers in their hands, together with a sum of money sufficient for the expenses of the journey in which one is engaged. Under this authority, no claim could be made for the pistol, the same being an

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article not necessary to the journey. The evidence on the part of the plaintiff was that he boarded the car at Mobile for Birmingham, the latter place being his home and destination, and also that he was general traveling agent of the New York Life Insurance Company, and that it was usual for persons having much traveling to do to carry with them mileage tickets. This being the undisputed proof, he was entitled to recover for the loss of the tickets. For the value of the remaining articles, to wit, the opera glasses, glass and brass compass, razor and strap and accoutrements, and nasal syringe, with accompaniments, being such articles as add and contribute to the comfort, pleasure, and enjoyment of the traveler, and such as are not unusual to be carried by hand while traveling, together with the satchel which contained the same, the plaintiff was also entitled to judgment.

It is insisted that the market value of the articles lost is the only criterion of value; and, the plaintiff's evidence failing to show any market value, he cannot recover. Where it is shown that the property in question has a market value, then that is the proper standard of value; but, if the property be not shown to be marketable, the rule would not apply. It is said in Hutch. Carr. § 770b: "The general of damages in trover, and in contract for not delivering goods, undoubtedly is the fair market value of the goods. But this rule does not apply when the article sued for is not marketable property." In *Railway Co. v. Nicholson*, 61 Tex. 550, it is said: "The lost articles seemed to be of such a character, *viz.* second-hand clothing, books, and table furniture, which had been used by the plaintiff, that they could not be said to have to him a value at one place different from what they possessed at another. He could hardly have supplied himself in the market with goods in the same condition and so exactly suited to his purposes as were those of which he had been deprived. As compensation for the actual loss is the fundamental principle upon which this measure of damages rests, it would seem that the value of such goods to their owner

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would furnish the proper rule upon which he should recover, —not any fanciful price that he might for special reasons place upon them, nor, on the other hand, the amount for which he could sell them to others, but the actual loss in money he would sustain by being deprived of articles so specially adapted to the use of himself and his family.” See, also, the case of *Railroad Co. v. Frame*, 6 Colo. 385. The plaintiff in the present case testified to the value of the articles lost; and, there being no evidence that the articles had any market value, this evidence of value by the plaintiff was sufficient. The judgment of the city court will be reversed, and judgment here rendered in favor of appellant for \$46.25,—that being the total value of the articles lost, and for which the defendant (appellee) is held responsible,—together with interest on the same from the 15th day of November, 1895.

SOUTHERN RY. CO.

v.

DAWSON.

(Supreme Court of Appeals of Virginia, Sept. 20, 1900.)

Injury to Passenger on Freight Train—Presumption of Negligence—Care Required of Railroad.*—Where a passenger on a freight train is injured by reason of a collision between separated sections of the train, the presumption is that the injury occurred through the negligence of the railroad company, and the latter must prove, in order to prevent a recovery, that there has been no negligence on its part, and that the injury was caused by inevitable casualty, or by some cause which human care and foresight could not prevent.

Excessive Verdict.—In an action for such an injury, the verdict will not be disturbed as excessive, where there is nothing to indicate that the jury, in ascertaining the damage, acted under the impulse of an improper motive, gross error, or misconception of the subject.

*See note, 14 Am. & Eng. R. Cas., N. S., 289; note, 12 Am. & Eng. R. Cas., N. S., 173 *et seq*; note, 17 Am. & Eng. R. Cas., N. S., 240.

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ERROR by defendant to Nelson county circuit court.
Affirmed.

Chas. M. Blackford, for plaintiff in error.

S. B. Whitehead and Diggs & Perkins, for defendant in error.

HARRISON, J. The defendant in error bought a ticket which entitled him to transportation on a freight train of the plaintiff in error, which was provided with a car for the use of passengers, from Coveseville, in Albemarle county, to Fabers Mills, in Nelson county. While on the way the train, consisting of about 30 cars, separated, from some unknown and unexplained cause, several cars were derailed, and the separated cars collided with such force that the defendant in error was thrown from his seat with great violence and seriously injured.

This suit for damages followed, and resulted in a verdict in favor of the defendant in error for \$2,000.

The sole ground of error assigned is that the circuit court refused to set aside the verdict upon the ground that it was excessive and contrary to the law and the evidence.

The plaintiff in error contends that the accident was inevitable, and that no skill or care on its part could have avoided it, and that the risk of such an accident was assumed by the defendant in error when he bought his ticket.

It is well settled that a railroad company is held to as strict an accountability for the negligence of its employees in the management of a freight train with a caboose attached, in which passengers are seated, as the law imposes in the transportation of passengers on trains specially provided for that purpose.

When a person becomes a passenger on a freight train, he assumes the risks and inconvenience necessarily and reasonably incident to that mode of travel; but life and limb are as valuable in the caboose as in the palace car, and the

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degree of care required to avoid damage to the passenger is as high in the one case as the other. *Thomp. Carr.* p. 234, § 20; *Railroad Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898.

Where an injury happens as the result of an accident such as the record discloses, the presumption is that it occurred by the negligence of the railroad company; and the burden of proof is on the company to establish that there has been no negligence whatsoever, and that the damage was caused by inevitable casualty, or by some cause which human care and foresight could not prevent. *Railroad Co. v. Noell's Adm'r*, 32 *Grat.* 394.

Injury to Passenger on Freight Train—Presumption of Negligence—Care Required of Railroad.

In the case at bar the plaintiff in error has failed to sustain the burden thus imposed upon it. The evidence, which has been certified, was sufficient to justify the jury in the conclusion reached,—that the accident was the result of negligence on the part of the plaintiff in error. Certainly it cannot be said that the evidence is plainly insufficient to support the verdict,—a conclusion necessary to justify this court in setting the verdict aside because contrary to the evidence. *Kimball v. Friend's Adm'r*, 95 Va. 125, 27 S. E. 901.

Nor can the verdict be disturbed upon the ground that it is excessive; there being nothing to indicate that the jury, in ascertaining the damage, acted under the impulse of an improper motive, gross error, or misconception of the subject. *Railroad Co. v. Shott*, 92 Va. 34, 22 S. E. 811.

Excessive Verdict.

For these reasons, the judgment must be affirmed.

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DENVER & R. G. R. Co.

v.

ROLLER *et al.*

(*Circuit Court of Appeals, Ninth Circuit, February 5, 1900.*)

Foreign Railroad Companies—Service of Summons—Statute.*— Under section 411 of the Code of Civil Procedure of California, providing that, "The summons must be served by delivering a copy thereof as follows: * * * (2) if the suit is against a foreign corporation, or a non-resident joint stock company or association, doing business and having a managing or business agent, cashier or secretary within this state, to such agent, cashier, or secretary," where the action is against a foreign railroad company having a business office in the state, and a managing agent in charge of this office, for the purpose of soliciting business in transporting passengers and freight over its road, situated in another state, valid service of summons may be made upon such agent.

Same—Injury to Passenger in Another State—Jurisdiction—Transitory Action—Statute.—An action against a railroad corporation for personal injuries sustained by its passenger through negligence is transitory, and in the absence of statute may be brought in any state or county where the court can obtain jurisdiction of the corporation; and under this rule and the statutes of California a foreign railroad corporation, upon which legal service of process can be made within the state, may be sued therein for an injury to its passenger sustained within another state.

Carriers of Passengers—Liability for Negligence of Lessee.—A defendant railroad company is liable for an injury to a passenger on one of its trains resulting from a collision caused by the negligence of another company in using the railroad jointly with defendant, under a lease from the latter.

Instructions.—A requested instruction on the subject of damages not warranted by the evidence was properly refused.

Injury to Passenger—Damages—Injuries from Mental Shock.†— Where there was any fright or shock resulting from a passenger's

*See *Wall v. Chesapeake & O. Ry. Co.* (C. C. A.), 15 Am. & Eng. R. Cas., N. S., 413, and *note*, p. 425.

†See *note*, 18 Am. & Eng. R. Cas., N. S., 44.

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bodily injury in connection with a collision, an accompanying explosion, fire and wreckage of the cars, and the surrounding circumstances directly connected therewith and solely attributable thereto, she may recover for the damages resulting from such fright and shock, as well as for all other damages reasonably and approximately resulting from the accident.

Same—Same—Future Suffering.*—Compensatory damages for bodily injuries embrace all damages for bodily and mental pain and suffering which have resulted from such injuries, and if they are permanent, or there has been no recovery from them, such damages, also, as the jury may find from the evidence it is fair to believe the injured person will suffer from such injuries in the future.

Testimony—Medical Experts—Cause of Injuries—Complaints of Patient—Permanency of Injuries.—A medical expert as a witness may express an opinion of the nature and cause of the bodily or mental condition of his patient,—her ills, symptoms, pains and suffering,—derived from his own knowledge, from his attendance, treatment, and examinations, although based in part upon her statements and complaints, made at different times as to her pains and sufferings, and, in this connection, to give his opinion whether her injuries are liable to be permanent, and whether her present condition is due to or caused by sickness, injury, accident, or violence.

Expert Testimony—Hypothetical Questions.—Where the hypothetical question assumes the existence of any state of facts which the evidence directly, fairly, and reasonably tends to establish, and does not transcend the range of the evidence, it is not necessary that it shall embrace or cover all the facts in the case, in order to render it proper to permit it to be answered.

Collision—Injury to Passenger from Mental Shock—Res Gestæ.—Where it is claimed that plaintiff's condition after a collision, which occurred while she was a passenger on defendant's train, was in part the result of a shock to her nervous system, and whether she sustained the shock while in the car or after she left it was not established by direct evidence, it was proper to admit evidence to show that plaintiff and other passengers, immediately after they left the car, and while standing on an embankment near the track, saw the front end of the train burning; that the cars were telescoped and were burning fiercely; that they heard people hollering and cattle bellowing; that they heard the cracking of the fire; that wounded persons were brought near them, moaning and complaining, and women crying; and that they remained upon the embankment about 30 minutes; as all such circumstances were a part of the *res gestæ*,

*See note, 12 Am. & Eng. R. Cas., N. S., 193.

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and tended to show that the railroad company was responsible for the condition of plaintiff's nervous system and her injuries resulting therefrom.

Same—Injury to Passenger—Evidence—Photographs.*—In such action, it was proper, upon proof of their correctness, to admit in evidence photographs of the wreck and all its surroundings, for the purpose of enabling the witnesses to explain their testimony as to the facts, or to assist the jury in arriving at a better understanding of the testimony.

Same—Injury to Passenger from Mental Shock—Whether Special Damages—Pleading.—In such an action, if it is shown that plaintiff, alarmed by the peril in which she was placed by the collision, but acting as a person of ordinary prudence would under like circumstances, jumped from the car into a deep trench, and, in order to reach a place of safety, climbed up a steep embankment, and there saw the horrors incident to such a collision, and the fright or shock to her system, added to the injuries to her body, impaired her health, and was directly traceable to the collision, as its primary, proximate, and responsible cause, the damages resulting therefrom would be general, not special, and therefore need not have been specifically set forth in the complaint.

Instructions.—If the charge of the court in its entirety fairly covers the legal propositions necessary to give instructions upon, and is substantially correct, it is not erroneous for the court to refuse the instructions prepared by counsel, although they contain correct principles of law applicable to the case.

ERROR by defendant to the circuit court of the United States for the Southern district of California. *Affirmed.*

Stephen M. White and Charles Monroe (Henry T. Rogers, of counsel), for plaintiff in error.

Lynn Helm, for defendants in error.

Before MCKENNA, Circuit Justice, GILBERT, Circuit Judge, and HAWLEY, District Judge.

HAWLEY, District Judge. This action was instituted to recover damages for injuries received by Katherine A. Roller, one of the defendants in error, on September 9, 1897, while a passenger on the railroad of plaintiff in error, in a wreck which occurred between a freight train of the Colorado Midland Company and the regular pas-

Case Stated.

*See note, 7 Am. & Eng. R. Cas., N. S., 519.

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senger train of the plaintiff in error, a corporation organized under the laws of Colorado. The Colorado Midland Railroad Company owned and operated a railroad extending from Colorado Springs to New Castle. From New Castle to Rifle Creek, it operated its trains over that portion of the Denver & Rio Grande Railroad under a lease from that corporation. The trains of the respective roads were run by the employees of the respective companies under a time-card and rules for running trains prepared by the plaintiff in error. The record shows that the collision in question was caused by the negligence of the employees on the train of the Colorado Midland Railroad Company, and that the plaintiff in error and its employees were entirely free from any negligence in the matter. This action was brought in the superior court for Los Angeles county, state of California. Summons was issued and served upon W. J. Shotwell, who was the agent of the plaintiff in error at San Francisco, Cal., authorized to solicit and contract for passengers and freight to be carried from the state of California over other lines, and then over the railroad of the plaintiff in error in the state of Colorado, and the soliciting and contracting for passengers and freight to be carried from Eastern points through the state of Colorado to the state of California. The plaintiff in error does not own or operate any railroad in the state of California. The cause of action arose wholly within the state of Colorado. After the service of the summons the action was removed by the plaintiff in error from the state court to the circuit court of the United States for the Southern district of California. A motion was then made to quash the summons and dismiss the action upon the ground that neither the circuit court nor the superior court of the state had or have any jurisdiction of the subject-matter of the action, or of the person of the corporation. The court denied this motion, and its ruling thereon is made the basis of an assignment of error.

1. Did the court err in refusing to quash the summons? In

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determining this question it becomes our duty to look prayerfully to the statute of California under which the service of the summons was made. The Code of Civil Procedure (section 411), applicable to this case, provides that :

Foreign Rail-
road Companies—
Service of Sum-
mons—Statute.

"The summons must be served by delivering a copy thereof, as follows : * * * (2) if the suit is against a foreign corporation, or a non-resident joint stock company or association, doing business and having a managing or business agent, cashier, or secretary within this state, to such agent, cashier, or secretary."

The plaintiff in error had an officer in the city of San Francisco. Upon the windows of this office were signs which read, "Denver & Rio Grande R. R. Freight and Passenger Office." In a folder used and distributed by it for public information, giving the places of its offices and agents, is found the name of "W. J. Shotwell, Gen'l Agt. Pacific Coast, 314 California St., San Francisco." W. J. Shotwell, in his affidavit, says :

"That he is the general agent for the Denver & Rio Grande Railroad Company, a defendant herein, for the states of California and Nevada. * * * That it is true that in his office in San Francisco he and the clerks under him solicit passengers and freight to go over the Denver & Rio Grande Railroad. * * * This affiant endeavors to induce shippers of freight to send it from San Francisco, so that during its route east it will go over the Denver & Rio Grande road. * * * That he issues a shipping receipt or bill of lading for the goods to be shipped from San Francisco. * * * That his only employment is for the purpose of soliciting freight and passenger business, and in influencing shippers and passengers to ship their freight and to travel over the Denver & Rio Grande road in the state of Colorado."

It thus clearly appears that the plaintiff in error had a business office in the city of San Francisco, state of California, and a managing agent in charge of that office, for the purpose of soliciting business in transporting passengers and

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freight over its road, situated in the state of Colorado. Is not this sufficient to authorize a valid service of summons upon the authorized agent of the corporation? It will be noticed that, if there is no cashier or secretary upon whom service can be made, the Code does not specify the extent of the agency required in order to bind a nonresident corporation by service of summons, except that the person must be a "managing or business agent." It is obvious that this does not mean that it must be the general managing agent of the corporation. The object of the service is attained when the agent served is of sufficient rank and character as to make it reasonably certain that the corporation will be notified of the service, and the statute is complied with if he be a managing or business agent in any specified line of business transacted by the corporation in the state where the service is made. That Shotwell, upon whom the service was made, was such an agent, is manifest from the facts above stated.

In *Tuchband v. Railway Co.*, 115 N. Y. 437, 440, 22 N. E. 361, the court said:

"When the corporation has an office in this state, where a substantial portion of its business is transacted by a person designated by itself as a general agent, although followed by words indicating some one department, it may safely be assumed that the object of the statute will be accomplished. It, of course, intends a 'managing agent' in this state, and, where a corporation created by the laws of any other state does business in this state, the person who, as its agent, does that business, should be considered its managing agent; and more especially should that be so where the foreign corporation has an office or place of business in this state, and when that office is in charge of that person, and he there acts for the corporation. He is there doing business for it, and so manages its business. Such person is, in every sense of the words used in the statute, 'a managing agent.' "

In *Merchants' Mfg. Co. v. Grand Trunk Ry. Co. (C. C.)*, 13 Fed. 358, the court said:

"A corporation, although it cannot migrate beyond the

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limits of the sovereignty which has created it, may by comity exercise its franchise elsewhere. A foreign corporation can transact business here upon such conditions as may be imposed upon it by the laws of this state. It can be sued whenever the technical obstacles in the way of compelling its appearance do not exist. At common law, process must be served on its principal officer within the jurisdiction of the sovereignty where the corporate body exists. But it can waive this requirement, and consent to be served in a different manner, and when it does this it stands on the same footing with a natural person. When it avails itself of the privileges of doing business in a state whose laws authorize it to be sued there by service of process upon an agent, its assent to that mode of service is implied. Accordingly it has been repeatedly held that a foreign corporation consents to be amenable to suit by such mode of service as the laws of the state provide, when it invokes the comity of the state for the transaction of its affairs. *Insurance Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Railroad Co. v. Harris*, 12 Wall. 81, 20 L. Ed. 354; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853. It waives the right to object to the mode of service of process which the state laws authorize."

See, also, *Railroad Co. v. Estill*, 147 U. S. 591, 596, 606, 13 Sup. Ct. 444, 37 L. Ed. 292; *Van Dresser v. Navigation Co. (C. C.)*, 48 Fed. 202; *Norton v. Railroad Co. (C. C.)*, 61 Fed. 618; *Palmer v. Herald Co. (C. C.)*, 70 Fed. 886; *Foster v. Lumber Co.*, 5 S. D. 57, 68, 58 N. W. 9, 23 L. R. A. 490; *Palmer v. Pennsylvania Co.*, 35 Hun 369; *McNichol v. Agency*, 74 Mo. 457; *Stone v. Insurance Co.*, 78 Mo. 655, 658.

2. Did the courts in California have jurisdiction of the subject-matter of this action? This question is dependent to a great extent upon the conclusions already reached as to the validity of the service of the summons. The Code of Civil Procedure of California, in treating of the place of trial of civil actions, specifies (1) certain civil actions that are to be tried in the county in which the subject of the action, or some part

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thereof, is situated; (2) of other actions, where the cause, or some part, arose in the county; (3) of the place of trial of actions against counties. Then comes section 395, as to the place of trial of other actions according to the residence of the parties. In this section we find that "if none of the defendants reside in the state * * * the same may be tried in any county which the plaintiff may designate in his complaint." It will be observed, by a careful reading of the statute, that actions of the nature and character of the one under consideration are not mentioned in the list of actions that must be tried where the subject of the action is situate, or where the cause of action arose. The contention of the plaintiff in error is that the statutes of California do not give jurisdiction, but simply provide in what county suits, over which the courts of California have jurisdiction, shall be brought, and how the service of summons may be made. Can this contention be sustained? There is no decision of the supreme court of California construing the various statutes we have cited with reference to the particular facts of this case. But in *Thomas v. Mining Co.*, 65 Cal. 600, 602, 4 Pac. 641, the court had under consideration a motion for a change of the place of trial. The defendant was an English corporation. It had never designated a person upon whom service of process could be had, but the summons was served upon its managing agent. One of the questions presented was whether a foreign corporation doing business in California had a residence in any particular county, such as contemplated by the provisions of the Code of Civil Procedure relating to the place of trial; and in the course of the opinion the court said:

"A foreign corporation cannot do business here without subjecting itself to the jurisdiction of our courts, but it is not a necessary corollary that it is entitled to claim a 'residence' here. It cannot escape the consequences of an illegal act done by its agents, within the scope of the authority it has conferred upon them, by setting up an existence under a foreign government. *People v. Central R. R. of New*

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Jersey, 48 Barb. 478. It is liable to be sued here to the same extent as an individual or company incorporated under the laws of this state. *Austin v. Railroad Co.*, 25 N. J. Law 383. It may be sued here, not because it resides here, but because it has chosen to do business here by its agents. Its home is in the country where alone it has its being. As it resides, if anywhere, out of the state, an action against it may be tried in any county designated by the plaintiff. Code Civ. Proc. § 395."

The general drift and tendency of judicial decisions, state and national, is in the direction of placing corporations upon the same plane as natural persons, in regard to the jurisdiction of suits by or against them. The statutes of the different states and of the United States have, as a general rule, been liberally construed for the purpose of sustaining this view, although the decisions of the state courts upon the precise point under discussion are not entirely harmonious. We are of opinion that the decided weight of authority and of reason is in favor of the jurisdiction of the state court over the present action, under the provisions of the statutes of California above cited, and upon the facts disclosed by the record.

In *Railroad Co. v. Estill*, *supra*, the facts were in all essential respects similar to the case in hand. There two suits at law were brought against the railroad company, which was incorporated under the laws of the state of New York, in the state court of Saline county, Mo., to recover damages for injuries by the railroad company, through negligence, to live cattle. The cattle were being transported from Massachusetts to Missouri. The damage occurred from a collision which took place in Ohio. The summons was served in St. Louis, Mo., on a city passenger agent of the railroad company in its business office there, who had charge of it at the time of the service. The company there, as here, appeared, and upon petition removed the actions to the circuit court of the United States, because of diverse citizenship, and thereafter in the circuit court moved to quash the writ of summons

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on the ground that it was void and conferred no jurisdiction over the railroad company. The circuit court overruled this motion. The supreme court, in considering the assignments of error based upon this ruling, following the decisions of the state court of Missouri, held that the state court acquired jurisdiction of the actions, under the provisions of subdivision 4 of section 3489 of the Revised Statutes of Missouri of 1879, and section 3481 of the same statutes. These sections are substantially the same as sections 395 and 411 of the Code of California, heretofore cited. This is a transitory action, and could be tried in any state where jurisdiction could be obtained by proper service upon the corporation.

In *Curtis v. Bradford*, 33 Wis. 190, 192, in proceedings against a garnishee upon a judgment obtained against a railway company, where, as here, it was claimed that the court neither had jurisdiction of the defendant, nor of the subject-matter of the action, the court said:

"It further appears that the principal suit was brought to recover for injuries done to the plaintiff's wife while attempting to get aboard the defendant's cars at a station in Michigan. It was doubtless an action sounding in tort, for an injury inflicted in another state, but still one transitory in its character, and triable by the courts of this state. This proposition is in accordance with reason, and is amply sustained by the authorities to which we are referred. * * * Those authorities establish the doctrine that courts of general jurisdiction entertain actions for personal injury, even where the act complained of was committed in another state."

In *Railroad Co. v. Wallace*, 50 Miss. 244, 248, the collision of the train of cars whereby Wallace, the plaintiff, was injured, occurred in the state of Louisiana. The suit was brought in the state court of Lawrence county, Miss. The supreme court said:

"The court had jurisdiction of the subject-matter of the suit, and, as there is no objection to the service of process by which the plaintiffs in error are brought into court, * * * the court had jurisdiction of the plaintiffs in error; and, upon

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well settled principles, the court having jurisdiction of the subject-matter of the suit and of the defendants can entertain the suit and try the cause. Corporations are artificial persons, existing only in contemplation of law. They must dwell in the place of their creation, and cannot migrate to another state. But they are liable to be sued like natural persons in transitory actions, arising *ex contractu* or *ex delicto*, in any state where legal service of process can be had. * * * In transitory actions, foreign private corporations, like natural persons, may be sued anywhere where the court can obtain jurisdiction of the corporation, either by legal service of process or its appearance by attorney."

In addition to the authorities heretofore cited, see *Eingartner v. Steel Co.*, 94 Wis. 70, 74, 80, 68 N. W. 664, 34 L. R. A. 503; *Ackerson v. Railway Co.*, 31 N. J. Law 309; *Steed v. Harvey* (Utah), 54 Pac. 1011; *Block v. Railroad Co.* (C. C.), 21 Fed. 529.

In *Railroad Co. v. Harris*, 12 Wall. 65, 83, 20 L. Ed. 354, the facts were that Harris, while traveling as a passenger on the Baltimore & Ohio Railroad, was injured in a collision in the state of Virginia. He brought an action for damages against the railroad company in the supreme court of the District of Columbia. It will be seen, by reading the opinion in that case, that the cause of action arose neither in the state of Maryland, where the railroad company was incorporated, nor in the District of Columbia, where the action was brought, but in the state of Virginia. The decision, in effect, declares that a corporation of one state, lawfully doing business in another state, and legally served with summons in the state where the suit is brought, is subject to the jurisdiction of the court in that state. This decision has been universally followed in the United States courts.

In *Stewart v. Railroad Co.*, 168 U. S. 445, 448, 18 Sup. Ct. 106, 42 L. Ed. 539, the court said:

"An action to recover damages for a tort is not local, but transitory, and can, as a general rule, be maintained wherever the wrongdoer can be found. *Dennick v. Railroad Co.*, 103

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U. S. 11, 26 L. Ed. 439. It may well be that, where a purely statutory right is created, the special remedy provided by the statute for the enforcement of that right must be pursued; but, where the statute simply takes away a common-law obstacle to a recovery for an admitted tort, it would seem not unreasonable to hold that an action for that tort can be maintained in any state in which that common-law obstacle has been removed."

In *Steamship Co. v. Kane*, 170 U. S. 100, 112, 18 Sup. Ct. 530, 42 L. Ed. 969, the court, among other things, said:

"The present action was brought by a citizen and resident of the state of New Jersey, in a circuit court of the United States held within the state of New York, against a foreign corporation doing business in the latter state. It was for a personal tort committed abroad, such as would have been actionable if committed in the state of New York, or elsewhere in this country, and an action for which might be maintained in any circuit court of the United States which acquired jurisdiction of the defendant."

Numerous authorities might be cited to the same effect, but the above is deemed sufficient. The court did not err in refusing the motion of the plaintiff in error.

3. This brings us to the consideration of the questions raised at the trial of the case.

Did the court err in instructing the jury as follows:

"There is no controversy but that the pleadings and proofs show that a collision between the train of the defendant and that of the receiver of the Colorado Midland Railway Company occurred at the time, place, and in the manner alleged in the complaint, and that said collision resulted from the negligence of the employees of the receiver of the latter company, and that plaintiffs at the time of said collision were passengers on the said train of the defendant. The pleadings and proofs further show, beyond controversy, that the defendant owned the railroad track at the place of collision, and that at the time of the collision the receiver of the Colorado Midland Railway

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Company, under a lease from the defendant, was using said track jointly with the defendant. Upon the foregoing facts, as admitted and proved, concerning the ownership, lease, and use of said track, the court instructs you that the negligence of the employees of the receiver of the Colorado Midland Railway Company is imputable to the defendant, and that the defendant is accordingly responsible in law for said collision."

This instruction properly stated the law upon this subject. The plaintiff in error owed the defendants in error the duty of safe carriage. It had a direct responsibility to them. That responsibility and liability upon its part for damages, if any injuries occurred to them, it cannot avoid upon the ground that another company, to whom it had leased its road, was guilty of the negligence which caused the collision that resulted in the injuries complained of. This direct question was presented in *Railroad Co. v. Barron*, 5 Wall. 90, 104, 18 L. Ed. 591. The court, in considering it, said:

"It will be observed the defendants owned the road upon which they were running the car in which the deceased was a passenger at the time of the collision, and that the train in fault was running on the same road with their permission. The question is not whether the Michigan company is responsible, but whether the defendants, by giving to that company the privilege of using the road, have thereby, in the given case, relieved themselves from responsibility. The question has been settled, and we think rightly, in the courts of Illinois, holding the owner of the road liable. *Railroad Co. v. McCarthy*, 20 Ill. 385; *Railroad Co. v. Dunbar*, *Id.* 624; *Railroad Co. v. Whipple*, 22 Ill. 105. The same principle has been affirmed in other states. *Nelson v. Railroad Co.*, 26 Vt. 717; *McElroy v. Railroad Corp.*, 4 Cush. 400."

In *Central Trust Co. of New York v. Colorado Midland Ry. Co. (C. C.)*, 89 Fed. 560, 564, the question presented to the court arose upon exceptions to the report of the master fixing the liability for losses growing out of a collision between the trains of the respective railroad companies. The accident

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which was the foundation of the litigation took place, as here, between New Castle and Rifle Creek, in Colorado, under conditions precisely the same as are presented in this case. The court in the course of its opinion stated that the Denver Company, as a carrier of passengers, would be rightfully and primarily held responsible to the passengers, on its train, for the injuries received in the collision. See, also, *Railroad Co. v. Meech*, 163 Ill. 305, 308, 45 N. E. 290; *Railroad Co. v. Phinazee*, 93 Ga. 488, 21 S. E. 66; *Bank v. Smith*, 30 C. A. 133, 86 Fed. 398; *Patterson v. Railway Co.*, 54 Mich. 91, 98, 19 N. W. 761; *Kinney v. Railroad Co. (N. C.)*, 30 S. E. 313; *Benton v. Same*, *Id.* 333; *Pierce v. Same*, 32 S. E. 399, 402; *Central Trust Co. v. Denver & R. G. R. Co.*, 38 C. A. 143, 97 Fed. 239, 242.

4. It is next claimed that the court erred in charging the jury as follows:

"The only questions, therefore, which will require investigation at your hands, are: Was the plaintiff Katherine A. Roller injured by said collision? And, if she was so injured, what amount of damages will compensate for the injuries received? If the evidence fails to satisfy you that said plaintiff Katherine A. Roller was injured by said collision, your verdict will be for the defendant. If, however, you find from the evidence that said plaintiff Katherine A. Roller was injured by said collision, then your verdict will be for the plaintiffs, and, pursuant to the instructions hereinafter given, you will award such an amount of damages as will be a fair compensation for all injuries so sustained by the said Katherine A. Roller. You are further instructed that, if great fright was a reasonable and natural consequence of the circumstances in which the collision aforesaid, with the ensuing wreckage, explosion, and conflagration, placed said plaintiff Katherine A. Roller, and that she was actually put in fright by those circumstances, and that injury to her health was a reasonable and natural consequence of such great fright, and was actually and proximately occasioned thereby, said injury is one for which damages are recoverable."

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And, in connection with this part of the charge of the court, it is claimed that the court erred in refusing to give the following, among other, instructions asked for by the plaintiff in error:

"No damages can be given for fright or mental suffering resulting from mere risk or peril, where no actual injury has been sustained; nor for the results of mental or nervous disturbances, where no bodily harm is sustained."

The charge of the court must be construed with reference to the facts elicited at the trial. It will therefore be necessary, in relation to these, as well as other points to be hereafter discussed, to refer generally to such facts.

The passenger train of the plaintiff in error was composed of an engine, mail car, baggage car, smoking car, day coach, tourist sleeper, Pullman sleeper, and a special car. The defendants in error occupied a lower berth in the Pullman sleeper. They had retired. Mrs. Roller was clad in her nightdress when the collision occurred, near New Castle, but was not asleep. The collision occurred just before midnight, and the results were serious. The engines of the respective trains were thrown upon each other with great force. The front cars were telescoped. Immediately following the collision there was an explosion, caused by the gas with which the passenger trains were lighted. The portion of the train in front of the Pullman sleeper caught fire and was destroyed in the ensuing conflagration. The testimony of Mrs. Roller, detailing the facts, as they appeared to her at the time, and her previous and subsequent condition of health, is as follows:

"I was 27 years old last October. * * * I was married to Dr. Roller * * * the 9th of October, 1895. * * * Prior to the time of my marriage, * * * I cannot recall any sickness, except about 8 years ago I had the croup. I had no nervous trouble, and my mother had no nervous trouble, nor any member of the family. * * * My mother was not of a nervous disposition. * * *

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When I left Palmer, the 1st of September, 1897, I weighed 135 pounds. I was in perfect health. * * * I was not fatigued with the journey at all. Felt no effects from the altitude. * * * I retired right away after we left Glenwood Springs. I had my nightdress and my stockings on. Dr. Roller occupied the same berth with me. We had not gone very far. I had not gotten asleep yet, when I was awakened with a terrible bump, and I was brought upright in my berth. My head was knocked onto my chest. Then my head fell back onto the board, and there was not anything there. The pillow that was there seemed to be down lower, on my back. * * * I could see from the window a great light, and fire. When we went to bed the curtains were down almost all the way. When we were awakened they were up quite a bit. I heard what sounded like what we hear on the Fourth of July,—a cannon explosion. It was very distinct. I heard a noise right outside of my berth. Somebody said, 'If we can get them out, all right; but I have my doubts about it.' Then the noise went from my berth further up the car, and said, 'Get out, everybody, before you burn up.' I got up and ran for the door. I did not dress. I took out a serge skirt. I did not put it on. * * * I went out the furthest door from the engine. When I got to the door the Pullman conductor passed me, and jumped out before me. I jumped out after him. * * * The conductor got out on the same side, and did not help me off. I jumped off down to the ditch, quite a little distance. The next thing that happened, the doctor was trying to help me up on the embankment; and when I got up on the embankment I saw a man with his flesh all falling off, and I saw another man lying on the ground. I saw some people bringing back some more. It was light, and up in front the engines and cars were burning. * * * There was another car behind ours, and I went back quite a distance further than that car. There I met General and Mrs. Weidner. It was not longer than five or ten minutes after I got up on the bank. My husband stayed with me all the time. While I

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was moving back, Dr. Roller went back to the car to get my clothes, and he helped to dress me. * * * Before I left the car, when my head was knocked up onto my chest, I had a severe pain in my back and the back of my head. After I got out of the car, and up on the embankment, I had great pain in my back, of the weight of my head. I have suffered a great deal of pain in the back of my head and neck and in my right side. I first felt it in my right side the morning after the accident. I was up there on the embankment for three-quarters of an hour. I remained there until the conductor told me to get into the car. * * * We remained in the car until we got back to New Castle. * * * During that day in New Castle there was a terrible itching sensation all over my body. It continued until some time in October, after the accident. It was the hives. I never had anything like it before. I never had any sensation of pain prior to the accident. These sensations of pain have not ceased. They have grown very much worse. * * * Since the accident I have had a great many spells of exhaustion. * * * Before I took this journey I never knew but that my memory was all right. Now, if I should read anything this afternoon, I could not remember very well tonight."

Upon all material facts testified to by her she was corroborated by the testimony of other witnesses. There were several passengers in the Pullman car, at the time of the collision, who testified at the trial that they did not hear any remarks made by the conductor about any difficulty of getting the passengers out, or any statement by anybody to hurry and get out before they burned up, or anything to that effect. Some of them stated that the conductor, in answer to inquiry as to what was the trouble, said, "I am going forward to find out," and that he soon returned, and stated in a loud tone of voice that: "Passengers will get out and dress. There is a wreck ahead, and the cars are on fire, but you will have plenty of time to get out." It is apparent from the entire testimony that the injury to Mrs. Roller was real, not

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feigned. It will be observed that she did not testify that her injuries came from any fright. The injuries which she testified to were received from the effect of the collision while in her berth. Her testimony in this respect is uncontradicted. The character of the injuries she received was such as might not fully disclose the extent of them at once. She testified, however, she felt the pain in her head and neck. The next day she realized she had a pain in her right side. The truth is, as shown by the record, that she thereafter gradually declined in health, became nervous and subject to spells of exhaustion, and suffered great pain. In fact, it was admitted upon the oral argument that she had become a physical wreck, as compared with her general state of health

Instructions. previous to the injury. The sole contention of the plaintiff in error is that the instructions were erroneous, because the case was tried upon the theory that the injuries were the result of fright alone, and that there was no actual bodily injury, and that upon this point there was at least a conflict in the evidence. The record furnishes no facts to support this contention. It would have been error for the court, under the facts of this case, to have instructed the jury as requested by the plaintiff in error. The charge of the court, as given of its own motion, may be subject to criticism, but it is not erroneous. It will be noticed that the court, in its charge, said to the jury, "If the evidence fails to satisfy you that said plaintiff Katherine A. Roller was injured by said collision, your verdict will be for the defendant." Was not this explicit and clear? If there was no injury, that was the end of the case. In the briefs of counsel there is a lengthy discussion of the question whether fright or mental distress alone constitutes such an injury that the law will allow a recovery for it. This question is not involved in this case, and, for the purpose of this opinion, it may be conceded that any effect of a wrongful or negligent act which affects the mind alone, without injury to the body, will not furnish a ground of action. Whatever the rule in such cases may be, *en passant*, we apprehend that

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it will depend upon the particular facts in each case. There is no conflict in the authorities upon the question that when, by the negligence of the defendant's acts, the plaintiff receives a bodily injury, he is entitled to recover damages, not only for such injury, but for all the injurious results which are a reasonable and natural consequence thereof, and were actually and proximately occasioned thereby. We all know, by common knowledge, that serious results may naturally follow from bodily injuries, without breaking an arm, or leg, or bones of the body. The body and mind are so intimately connected that the mind is very often directly and necessarily affected by physical injuries. A nervous shock, without a blow to the person, might, under some circumstances, be so great as to cause bodily injury. In estimating the amount of damages which the defendants in error were entitled to recover, the jury had the right to take into consideration all the testimony as to the surrounding facts and circumstances at the time of, and incident to, the collision, including the position and situation in which Mrs. Roller was placed thereby, in order to arrive at the truth as to the extent of the bodily injuries she received, and the character and extent of the fright or shock, if any, to her system, resulting from and directly attributable to the collision and injury. In a case like the present, the proximate damages which the person injured is entitled to recover are the ordinary and natural results of the collision and injury, and are such as might reasonably be expected would follow therefrom. This general principle, wherever discussed, is expressly recognized by all the authorities, which hold that damages cannot be recovered for mere fright alone, without any bodily injury. If there was any fright or shock which resulted from her bodily injury in connection with the collision, the accompanying explosion, fire, and wreckage of the cars, and the surrounding circumstances directly connected therewith and solely attributable thereto, there is no substantial reason why she should not be allowed

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to recover all damages naturally and reasonably and proximately arising therefrom. The instruction under consideration was substantially taken from the opinion in *Bell v. Railroad Co.*, 26 Ir. Law R. 428, cited, reviewed, and held correct in *Sedg. Meas. Dam.* 640. In *Traction Co. v. Lambertson*, 59 N. J. Law 297, 36 Atl. 100, it was expressly held that, where there is actual physical injury, damages resulting from the incidental fright may be recovered. In *Warren v. Railroad Co.*, 163 Mass. 484, 487, 40 N. E. 895, the plaintiff, while attempting to drive a buggy over the track at a railroad crossing, was, by the carelessness and negligence of the gate keeper, shut in between the gates; and a passing train hit the buggy, and he was thrown out upon the ground. The trial court instructed the jury:

"If you should find that there was a tortious act on the part of the defendant, then you may take it into account, as part of the damage that the plaintiff is entitled to recover, if at all, for fright and mental suffering which he underwent, if he underwent any at all. It may be used to enhance damages,—fright caused by nervous shock."

Replying to the criticism of the term "tortious act," the court said:

"We think that the meaning of this phrase, in the connection in which it is used, is that if the defendant's train struck the carriage of the plaintiff, and he was thereby thrown out upon the ground, this would be a tortious act, if occasioned by the defendant's negligence, and that, if this act resulted in injury to the plaintiff, the defendant would be liable, if the plaintiff was in the exercise of due care, and that in estimating the damages the jury might take into account, not only the physical injury, but also the fright and nervous shock. This ruling, we think, was either correct, or sufficiently favorable to the defendant. It is a physical injury to the person to be thrown out of a wagon, or to be compelled to jump out, even although the harm done consists mainly of nervous shock."

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In *Railway Co. v. Kellogg*, 94 U. S. 469, 474, 24 L. Ed. 256, the court said :

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. 2 W. Bl. 892. The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. * * * When there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it."

The following additional authorities sustain the views we have expressed, and support the conclusion above announced,—that the court did not err in its charge to the jury : *Sloane v. Railway Co.*, 111 Cal. 668, 680, 44 Pac. 320, 32 L. R. A. 193; *Purcell v. Railway Co.*, 48 Minn. 134, 137, 50 N. W. 1034, 16 L. R. A. 203; *Railway Co. v. Marchant*, 28 C. C. A. 544, 84 Fed. 870, 872; *Coy v. Gas Co. (Ind. Sup.)*, 46 N. E. 17, 20; *Mack v. Railroad Co.*, 52 S. C. 323, 334, 29 S. E. 905, 40 L. R. A. 679, *et seq.*; *Hamilton v. Railway Co.*, 17 Mont. 334, 347, 42 Pac. 860, 43 Pac. 713.

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5. There are several other assignments of error that bear such a close relation to the last point as not to require any extended discussion, owing to the conclusions already reached :

(1) It is claimed that the court erred in the next portion of its charge, where, after informing the jury that exemplary or punitive damages could not be allowed, and that the damages, if any, which could be recovered, are compensatory damages, —such damages as would naturally flow directly from the injury, if any, occasioned to Mrs. Roller by said collision,— it added :

“These compensatory damages embrace all damages for bodily and mental pain and suffering which have resulted to said Katherine A. Roller from said injuries, and if said injuries are permanent, or she has not recovered from them, such damages, also, as you may find from the evidence it is fair to believe she will suffer from said injury in the future.”

This part of the charge was unquestionably correct. It is, of course, to be considered with reference to the facts, and to the previous portions of the charge. In *District of Columbia v. Woodbury*, 136 U. S. 450, 459, 10 Sup. Ct. 993, 34 L. Ed. 475, the court, in discussing this question, said :

“The authorities all agree that in cases of this character much latitude must be given to juries in estimating the damages sustained by the person injured. Physical suffering resulting from such injuries is necessarily attended by mental suffering in a greater or less degree. And as said in *Kennon v. Gilmer*, 131 U. S. 22, 26, 27, 9 Sup. Ct. 697, 33 L. Ed. 112 : ‘The action is for an injury to the person of an intelligent being ; and when the injury, whether caused by willfulness or negligence, produces mental as well as bodily anguish and suffering, it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded.’ *Railroad Co. v. Barron*, 5 Wall. 90, 105, 18 L. Ed. 591 ; *Canal Co. v. Graham*, 63 Pa. St. 290 ; *Smith v. Holcomb*, 99 Mass. 552 ; *Holyoke v. Railroad Co.*, 48 N. H. 541 ; *Stockton v. Frey*, 4 Gill 406 ; *Smith v.*

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Overby, 30 Ga. 241; *Cox v. Vanderkleed*, 21 Ind. 164; *Lynch v. Knight*, 9 H. L. Cas. 577."

In *Railroad Co. v. Harmon*, 147 U. S. 571, 573, 584, 13 Sup. Ct. 558, 37 L. Ed. 286, the court held that the following instruction was correct:

"If the jury find for the plaintiff, they will find for him such an amount of damages as will fully compensate him for the suffering of mind and body inflicted upon him by his injury; for the personal inconvenience, the loss of time, and the expenses of cure that naturally and proximately resulted from the injury he suffered; and, if they find that the injuries sustained by the plaintiff are permanent, they will also find for him such damages as will fully compensate him for the suffering of mind and body, the personal inconvenience, and the loss of time that he will suffer in the future. In determining this as to the future, they will consider plaintiff's bodily vigor and age, as shown by the evidence adduced."

See, also, *Koetter v. Railway Co. (Sup.)*, 13 N. Y. Supp. 459; *Kenyon v. City of Mondovi*, 98 Wis. 50, 54, 73 N. W. 314; *Wilson v. Railroad Co.*, 132 Pa. St. 27, 33, 18 Atl. 1087; *Saldana v. Railway Co. (C. C.)*, 43 Fed. 862, 867; *Stutz v. Railway Co.*, 73 Wis. 147, 151, 40 N. W. 653; *Railroad Co. v. Martin*, 111 Ill. 220, 227; *Railway Co. v. Taylor*, 170 Ill. 49, 57, 48 N. E. 831; *Cameron v. Trunk Line*, 10 Wash. 507, 512, 39 Pac. 128; *Hamilton v. Railway Co.*, 17 Mont. 352, 42 Pac. 860, and 43 Pac. 713.

(2) It is argued that the court erred in allowing Dr. Brill to state his opinion as to the cause of Mrs. Roller's condition, and to answer the hypothetical question propounded to him. The latter objection was also made to the testimony of other physicians. No witnesses were introduced by the plaintiff in error to disprove the testimony and opinions of these physicians as to the extent or cause of her injuries, nor were any amendments to the hypothetical question proposed; but the objections were made to the opinions given, and exceptions taken to their admission. Dr. Brill testified that he first met Mrs. Roller September

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28, 1897; that since that time he had been her family physician; that she complained at that time of pain in the back of the head and neck, in the right side, and along the spine, and of the itching from the hives; that she was somewhat nervous in her appearance and bearing; that there was not at that time any external violence that he could discover at the back of the head or neck, but there was some tenderness along the spine and along the back of the neck; that he prescribed for her in the usual manner; that he saw her every few days; that about the 1st of January, 1898, she began to lose flesh and lost strength and became somewhat pale and anæmic, more nervous, and more timid and apprehensive; that her whole bearing was changed, her pulse became accelerated, ranging from 90 to 110 or 120, and that there was a slight elevation of temperature; that in the early part of the year 1898 these symptoms persisted, and became more and more noticeable; that by the last of May she had become quite emaciated, had lost a great deal of flesh, her memory was tardy and defective, and her mental action slow; that there were muscular cramps and twitching in the limbs and face; that she complained of being weak, of loss of strength, and being nervous, and of pain in the back of the head and neck, and over the right side of the body, and in the spine. He continued detailing her condition up to the time of the trial; showing, among other things, that her sense of pain had become greatly diminished over her entire body, and that at some points it seemed almost obliterated. At the close of his testimony the following questions were propounded to him, and answers given thereto:

"Q. From your examination that you have made of her, and assuming that her condition is as you have testified upon the stand, as observed by you,—from the examination that you have made,—are you, as a physician and surgeon, and from your experience as such, able to form an opinion as to what is the cause of her present condition? A. Yes; I am. Q. What is that cause? A. Her condition is the result of injury and shock of some sort."

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(3) Thereafter a hypothetical question was propounded to Dr. Brill, substantially detailing at great length the condition of Mrs. Roller, as to her health previous to the collision and afterwards, as testified to by him and other witnesses, and of the fact of the collision and of all the circumstances connected therewith, substantially as testified to by Mrs. Roller, and other witnesses at the trial, and closing with the statement:

"Assuming these facts to be as I have stated them, and the woman as I have described her, from your experience as a physician and surgeon are you able to form an opinion as to the cause of her present condition? A. Yes, sir. Q. What is that opinion? * * * What would you say, then, was the cause of her present condition, assuming the facts as I have stated them? A. The injury and shock due to the accident described."

The court did not err in permitting Dr. Brill to give his opinion as to the cause of Mrs. Roller's condition. The rule is well settled that a medical expert may form and express an opinion of the nature and cause of the bodily or mental condition of his patient,—her ills, symptoms, pains, and suffering,—derived from his own knowledge, from his attendance, treatment, and examinations, although based in part upon her statements and complaints made at different times as to her pains and sufferings, and, in this connection, to give his opinion whether her injuries are liable to be permanent, and whether her present condition is due to or caused by sickness, injury, accident, or violence. *McClain v. Railroad Co.*, 116 N. Y. 460, 468, 22 N. E. 1062; *Railway Co. v. Wood*, 113 Ind. 545, 553, 14 N. E. 572, and 16 N. E. 197; *Turner v. City of Newburg*, 109 N. Y. 301, 308, 16 N. E. 344; *Johnson v. Railroad Co.*, 47 Minn. 430, 432, 50 N. W. 473; *Courvoisier v. Raymond*, 23 Colo. 113, 117, 47 Pac. 284; *Railroad Co. v. Newell*, 104 Ind. 264, 3 N. E. 836; *Railroad Co. v. Spilker*, 134 Ind. 381, 391, 33 N. E. 280, and 34 N. E. 218; *McKeon v. Railway Co.*, 94 Wis. 477, 483, 69 N. W. 175, 35 L. R. A.

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252; *Bowen v. Railway Co.*, 89 Hun 594, 597, 35 N. Y. Supp. 540; *Perkins v. Railroad Co.*, 44 N. H. 223, 225; *Jackson v. Burnham* (Colo. Sup.), 39 Pac. 577, 578; *Insurance Co. v. Mosley*, 8 Wall. 397, 404, 19 L. Ed. 437; *Railroad Co. v. Umlin*, 158 U. S. 271, 275, 15 Sup. Ct. 840, 39 L. Ed. 977.

In *Turner v. City of Newburg*, *supra*, the court said :

"The questions addressed to the physicians, calling for their opinions as to whether the physical condition in which they found the plaintiff to be, upon their examination of her, could have resulted from a fall, were not objectionable, and infringed upon no rules of evidence. We see no objection to the expression of opinions by competent medical experts upon an ascertained physical condition of suffering or bad health, as to whether that condition might have been caused by, or be the result of, a previous injury."

In *Railroad Co. v. Umlin*, *supra*, the court said :

"As one of the principal questions in the case was whether the injuries of the defendant were of a permanent or of a temporary character, it was certainly competent to prove that during the two years which had elapsed between the happening of the accident and the trial there were several medical examinations into the condition of the plaintiff. Every one knows that when injuries are internal, and not obvious to visual inspection, the surgeon has to largely depend on the responses and exclamations of the patient when subjected to examination. 'Whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof of its existence, and whether they were real or feigned is for the jury to determine. So, also, the representations by a sick person of the nature, symptoms, and effects of the malady under which he is suffering at the time are original evidence. If made to a medical attendant, they are of greater weight as

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evidence; but, if made to any other person, they are not, on that account, rejected.' 1 Greenl. Ev. (14th Ed.) § 102."

(4) The objections urged to the hypothetical question propounded to Dr. Brill and to other physicians are wholly untenable. The principal contention is that in detailing the circumstances in regard to the collision, and of Mrs. Roller's subsequent condition, some of the facts were misstated, and others exaggerated and assumed, without any warrant in the evidence. Let us see upon what foundation this claim is made:

Expert Testimony—Hypothetical Questions.

(a) The question, in stating the facts at the time of the collision, assumes that Mrs. Roller "was asleep," whereas her testimony was that she "had not gotten asleep yet," when she was awakened with a terrible bump, etc. What influence could such a trifling discrepancy possibly have in controlling the answers of the physicians or the judgment of the jurors? None whatever. What difference did it make whether she was at the time dozing, sound asleep, or fully awake?

(b) The next alleged misstatement and exaggeration is that there "was a series of shocks * * * accompanied by explosions and loud detonations," whereas Mrs. Roller only testified that there was one explosion and detonation. Her words were that she "heard what sounded like what we hear on the Fourth of July,—a cannon explosion." But in framing the question the counsel is not to be confined to the testimony of Mrs. Roller, nor to the use of the exact and precise words of any witness. Its substance and true meaning need only be given.

Dr. Roller, in testifying upon the point under review, said:

"We had a head to head collision. We were thrown forward in our berths. We had one concussion, and immediately after that we had another."

Peter Weidner testified:

"We had a collision. I could not just tell what it was at the time it happened, but I found we had stopped very suddenly, and then drew back and had another concussion,

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and shook us up pretty well. Immediately after the collision there was a heavy explosion."

William C. St. Pierre, a passenger, called on behalf of the plaintiff, who was only affected slightly by the stopping of the train, testified:

"I noticed a sudden jar in the car, and then another one. I suppose the first jar was the application of air brakes. The next jar came immediately afterwards. A short while after that there was an explosion. I cannot tell how much time elapsed between the last jar and the explosion. It was some little time."

If the identical language used by these witnesses had been inserted in the question, it would have conveyed to the physicians and jury, in substance, the same meaning as the language inserted in the question. There was more than one concussion, more than one detonation. It is manifest that the change in the language used could not have had any greater influence with the physicians and jury than if the actual words used by the witnesses had been given.

(c) The other portions claimed to be objectionable are that:

"By the said collision she was thrown violently in the said berth, and against the head end of said berth, and the back of her head and back of her neck being impressed against the head end of said berth, and, in fear of her personal safety was compelled, in her nightdress, * * * to alight from said train in the nighttime, and * * * to descend into a deep trench * * * and ascend a steep embankment, and there to be exposed until her clothes would be brought to her, and there was exposed to her sight persons injured in said collision."

Counsel argue that the use of the words "violently" and "compelled" was absolutely erroneous and prejudicial, and wholly unwarranted by any evidence. In lieu of the word "violently," Mrs. Roller used the word "terrible," which, in its ordinary signification, means "frightful; adapted to excite terror; dreadful." It will be noticed that the word "compelled," as used, did not, and was not intended to,

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convey the idea that she was compelled by any command of the plaintiff in error or its agents to leave the train, but that she was compelled in fear of her personal safety. This is virtually what she testified to.

We have examined these questions for the purpose of showing that there was no substantial ground upon which to base any valid objection to the hypothetical question. The objections noticed are the most formidable made by counsel, and the others, being equally without merit, need not be noticed. In all that we have said, it must be distinctly understood that we do not deny the general proposition urged by counsel, but here expressly affirm the same,—that it would be reversible error to admit the answer of expert witnesses to hypothetical questions which assume the existence of facts upon which no evidence is offered. But when the question assumes the existence of any state of facts which the evidence directly, fairly, and reasonably tends to establish or justify, and does not transcend the range of evidence, it is proper to permit such questions to be answered, and it is not necessary that the questions shall embrace or cover all the facts in the case. *Railway Co. v. Wood*, 113 Ind. 545, 554, 14 N. E. 572, and 16 N. E. 197; *Stearns v. Field*, 90 N. Y. 640; *Powers v. Kansas City*, 56 Mo. App. 573, 577; *Meeker v. Meeker*, 74 Iowa 352, 357, 37 N. W. 773; *Bever v. Spangler*, 93 Iowa 576, 602, 61 N. W. 1072; *Manatt v. Scott (Iowa)*, 76 N. W. 717, 720; *Russ v. Railroad Co.*, 112 Mo. 45, 48, 20 S. W. 472, 18 L. R. A. 823; *Fullerton v. Fordyce (Mo. Sup.)*, 44 S. W. 1053, 1056; *Rog. Exp. Test.* (2d Ed.) § 27; 8 Enc. Pl. & Prac. 757, 758, and authorities there cited.

6. It is with much vigor and earnestness argued that the court erred in permitting witnesses to testify to what they saw and heard while upon the embankment after Mrs. Roller had left the car, and in failing to instruct the jury that there could be no recovery for any injuries resulting from what she there saw. The substance of this testimony was that Mrs. Roller and other passengers, when they got upon the embank-

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ment, saw the front end of the train burning; that the cars were telescoped and were burning fiercely; that they heard people hollering and cattle bellowing; that they heard the cracking of the fire; that wounded persons were brought near them, moaning and complaining, and women crying; that they remained upon the embankment about 30 minutes. The objections are that all this testimony was incompetent, irrelevant, and immaterial; that it did not tend to prove any of the issues raised by the pleadings; that it was not part of the *res gestæ*, and too remote. It is contended, among other things, that, inasmuch as Mrs. Roller did not testify to having been frightened or injured by anything she there saw or heard, it was error to allow any testimony as to what there occurred. The truth is that there was no direct evidence that she was frightened at the time of the collision, either while in her berth in the sleeper, at the sight of the conflagration, or the sound of the explosion, or at what she saw and heard after she left the car. Whether she received any fright or shock to her system was a matter of inference to be drawn by the jury from all the established facts, as well as from the opinion of the medical experts. The jury were not bound to accept such opinion unless they believed it was supported by the facts. The shock, if any, to her system, may have, for aught that appears from the testimony, been solely from the effects of the terrible bump she received while in her berth, or from some other cause, or by all combined. The reasons given, why the testimony as to what occurred on the embankment should have been excluded, would apply with equal force against any testimony as to the explosion, conflagration, or general wreckage; and, there being no positive testimony that she was frightened by the injuries she actually received while in her berth, it would appear that evidence as to that injury, to show a fright to her, would likewise, under the views contended for by counsel, be objectionable. But the reasoning of counsel is unsound. To enable the jury to determine the reasonableness of the question whether Mrs. Roller was frightened or received a shock from

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the collision, all the facts and circumstances connected therewith were admissible, because, in the very nature of the case, they were not divisible. Mrs. Roller was not guilty of contributory negligence in failing to close her ears and shut her eyes as to everything that transpired, resulting from the collision. She had the right to observe what was going on, to use her faculties of sight and hearing, and to exercise the ordinary speed of locomotion in seeking a place of safety, and in so doing to act at the time upon the facts as they appeared to her, regardless of the question as to whether her injuries would have been as great had she remained in the car, and taken time to fully dress before she departed therefrom. *Purcell v. Railway Co.*, 48 Minn. 134, 138, 50 N. W. 1034, 16 L. R. A. 203; *Twomley v. Railroad Co.*, 69 N. Y. 158, 160; *Kleiber v. Railway Co.*, 107 Mo. 240, 247, 17 S. W. 946, 14 L. R. A. 613; *Railway Co. v. Murray*, 55 Ark. 248, 258, 18 S. W. 50, 16 L. R. A. 787; *Stokes v. Saltonstall*, 13 Pet. 181, 191, 10 L. Ed. 115. It will be observed from the record that the testimony of the witnesses as to what they saw and heard while upon the embankment did not relate to any declarations of any officer or agent of the plaintiff in error as to how the accident occurred, upon which it was sought to hold the railroad company liable, nor to a narration of past events, upon which points counsel have industriously cited a vast number of authorities, but related almost exclusively to the facts which actually transpired at the time; the same being a part of, and directly connected with, the collision and wreck. How could the jury arrive at the truth without taking the facts into consideration, with all the surrounding circumstances of the collision incident thereto and connected therewith? The defendants in error had the right, although the seriousness of the collision was not denied, to have the actual condition of affairs photographed by the sworn testimony of all the witnesses; and here we may appropriately digress, and, answering another assignment of error, add that it was not error, in addition thereto,

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dence—Photo-
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to have the wreck, with all its surroundings, photographed by an artist, and, upon proof of their correctness, submit them to the jury. These photographs (three in number) fully illustrate the facts as testified to by the witnesses. Everything except the explosion and loud detonations is presented and truthfully delineated. The admission of such photographs is always allowed, when proven to be correct, for the purpose of enabling the witnesses to explain their testimony as to the facts, or to assist the jury in arriving at a better understanding of the testimony of the witnesses. 1 Whart. Ev. § 676; 1 Whart. Cr. Ev. § 544; *People v. Durrant*, 116 Cal. 179, 212, 48 Pac. 75; 11 Am. & Eng. Enc. Law (2d Ed.) 539, and authorities there cited. Returning from this digression, we are of the opinion that the area of events covered by the term "*res gestæ*" depends upon the circumstances of each particular case. No general definition applicable to all cases could be fully and fairly given within the limits of an ordinary opinion. The centralized thought is that the term presupposes a main fact or a principal transaction, and the "*res gestæ*" means the circumstances and facts which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character. Applying the term to the present case, with reference to the main collision as the principal fact, it necessarily follows that the immediate and surrounding circumstances interblended with and directly resulting therefrom are to be considered as a part of the accident and injury, and inseparably connected with it. 1 Whart. Ev. § 259; 1 Greenl. Ev. § 108; *Carter v. Buchanan*, 3 Ga. 513, 517; *Hallahan v. Railroad Co.*, 102 N. Y. 194, 199, 6 N. E. 287; *Railroad Co. v. Kennelly*, 170 Ill. 508, 510, 48 N. E. 996; *Insurance Co. v. Mosley*, 8 Wall. 397, 408, 19 L. Ed. 437.

In *Railroad Co. v. Kennelly*, *supra*, the court said:

"The question before the jury was how or in what manner the plaintiff was injured, but we think it was competent, as a part of the *res gestæ*, to show all that occurred, although in doing so it might appear that others were also injured. The

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injuries to others were a part and parcel of the same injury received by the plaintiff, and in describing the manner in which she was injured, the injuries received by the others being so closely connected, it would be almost impossible in an intelligent manner to give an account of one injury without at the same time disclosing the others."

In *Railroad Co. v. Spilker*, 134 Ind. 380, 393, 33 N. E. 280, and 34 N. E. 218, the appellee received injuries in a collision which occurred at a railroad crossing between the train of appellant and a wagon in which Mrs. Spilker, her husband, David Casey, and others were seated. Certain evidence was objected to because it assumed that Casey was killed by the same collision, and it was argued in support of this objection that this allusion to Casey's death was calculated to prejudice the jury in favor of the appellee. The undisputed fact was that Casey was killed at the time the wagon was demolished by the collision. Upon these facts the court said:

"His death was the principal circumstance connected with the accident, and we do not see how it was possible, even if proper, to keep the knowledge of this circumstance from the jury. One might almost as well object to making any remark concerning the demolition of the wagon. David Casey's death is mentioned by several of the witnesses. It was inseparably connected with the accident, and a reference to him and his death could hardly be avoided. But it was not necessary to avoid it."

With reference to the objection that the details of the collision as given by the witnesses, while upon the embankment, were not put in issue by the pleadings, but little need be added to what we have already said in discussing other questions. The complaint alleged that:

"Katherine A. Roller was by said collision, while she was in said passenger coach as aforesaid, violently and forcibly thrown down and against the sides, berths,

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Mental Shock—
Whether Special
Damages—
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seats, and partitions of such coach, and was in the nighttime, and at the place of said collision, forced to alight from said passenger coach, and was by means of the premises greatly bruised, wounded, and injured, and also, by means of the premises, she became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto, during all of which time the said plaintiff suffered and underwent great bodily pain and mental anguish, and was for a long period confined to her bed, and was hindered and wholly unable to attend to the performance and transaction of her necessary duties and affairs, during all that time to be performed and transacted; and also, by means of the premises, the said plaintiff has been and will be permanently injured."

Under these allegations it was certainly competent, as we have before stated, to show any injury to her health which was the natural, probable, and reasonable result of the collision, and of her bodily injury received therefrom. This being true, it must follow that if, alarmed by the peril in which she was placed by the collision, but acting as a person of ordinary prudence would under like circumstances, she jumped from the car into a deep trench, and, in order to reach a place of safety, climbed up a steep embankment, and there saw the horrors incident to such a collision, and the fright or shock to her system, added to the injuries to her body, impaired her health, and was directly traceable to the collision, as its primary, proximate, and responsible cause, the damages resulting therefrom would be general, not special, and therefore need not have been specifically set forth in the complaint, because, in the eye of the law, there would not be any new or independent cause between the collision and the injuries. The obvious, probable, or natural effects of the injuries which Mrs. Roller received might be given in evidence under the general allegations of the complaint. It is only those damages which are not the probable or necessary result of the injury that are required to be specially alleged.

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The defendants in error were not required to set forth in their complaint all the physical injuries and mental sufferings which Mrs. Roller sustained, or which might have resulted from or be aggravated by the negligent acts of the plaintiff in error; nor were they required to aver each and every specific act and thing which occurred at the time of the collision which might or did contribute to her injuries. If such injuries and such acts could reasonably be traced to the main act complained of, and are such as might and did naturally follow from the collision, and were incident thereto, they need not be specially averred. The claim made, that the plaintiff in error was not advised by any of the allegations in the complaint that any damages were or would be claimed for any injury, fright, or shock which occurred after she left the car, cannot be sustained. When the plaintiff in error was informed by the pleading generally as to the effects produced by the collision, it was bound to anticipate evidence as to the extent of her injuries, the origin or aggravation of which could be reasonably traced to the negligent act complained of. *Ehrgott v. City of New York*, 96 N. Y. 265, 277; *City of Chicago v. McLean*, 133 Ill. 149, 153, 24 N. E. 527; *Montgomery v. Railway Co.*, 103 Mich. 47, 57, 61 N. W. 543, 29 L. R. A. 287; *Snyder v. City of Albion (Mich.)*, 71 N. W. 475; *Croco v. Railroad Co. (Utah)*, 54 Pac. 985; *Railroad Co. v. Hecht*, 115 Ind. 444, 17 N. E. 917; *Railway Co. v. Harris*, 122 U. S. 597, 608, 7 Sup. Ct. 1286, 30 L. Ed. 1146; *Wade v. Leroy*, 20 How. 34, 44, 15 L. Ed. 813; 5 Enc. Pl. & Prac. 746, 748, and authorities there cited.

In *Smith v. Railway Co.*, 30 Minn. 169, 171, 14 N. W. 797, where the injuries to the plaintiff were received from a derailment of the cars of the defendant company, the facts were in some respects similar to the facts in the present case. The complaint did not allege anything about any fright, and did not specify any more of the details of the injury than is set forth in the complaint in this action. The court, with reference thereto, said:

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"In the circumstances mentioned, the damages resulting directly and proximately to the person and health of plaintiff * * * from her fright and from her coming to the ground, whether by jumping or by any of the means before indicated, would be general, not special. 'General damages are such as the law implies or presumes to have accrued from the wrong complained of.' 1 Chit. Pl. (16th Am. Ed.) 515. They are frequently spoken of as necessarily resulting from the wrong. 1 Chit. Pl. (16th Am. Ed.) 439, 515, 516; 2 Greenl. Ev. § 254. This, however, does not mean, as defendant's counsel appears to argue, that general damages are such only as must, *a priori*, inevitably and always result from a given wrong. It is enough if, in the particular instance, they do in fact result from the wrong, directly and proximately, and without reference to the special character, condition, or circumstances of the person wronged. The law, then, as a matter of course, implies or presumes them as the effect which in the particular instance necessarily results from the wrong."

7. Finally it is claimed that the court erred in refusing to give 40 instructions asked by the plaintiff in error. In *Heating Co. v. O'Brien*, 19 Ill. App. 231, 234, the court said :

Instructions. "To launch such a mass of legal conundrums upon a court, which can never enlighten the jury, but are generally drawn with the real, if not avowed, purpose of getting error into the record, and entangling the court in some technical contradiction that may be used in a higher court, is a perversion of the law of instructing jurors. A few plain statements of the law governing the case would suffice. If the court in the hurry of trial did not sift this unreasonable number of instructions as carefully as appellant desired, we do not feel called upon to interfere, unless some palpable error has occurred, clearly affecting the justice of the case."

Specific exceptions were taken to each instruction refused. Several of them, relating to the duties and obligations of railroad companies to their passengers, were evidently pre-

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pared upon the theory that, because the Midland Company was alone to blame, the plaintiff in error was not guilty of any negligence, and could not be held liable. These were inapplicable to the facts in this case, and were properly refused. Some were drawn upon the theory that the jury had no right to consider anything that occurred after Mrs. Roller left the car. These have been sufficiently disposed of by the views expressed with reference to the admission of the testimony. Others assert the broad principle that Mrs. Roller ought to have remained in the car, or at least should have avoided the sights upon the embankment, by returning to the car or going elsewhere, where the effects of the wreck would not have been observed. Such a narrow and limited view of the case cannot be sustained. The instructions asked, covering the measure of damages that could or could not be recovered, may, for the purpose of this opinion, be conceded to be correct and applicable to this case. The objections urged to their exclusion are based upon the criticism of counsel directed to the charge of the court,—that it was not full, did not contain the necessary limitations and qualifications, and of itself did not cover the different views that might properly be taken of the case. Our examination of the charge has failed to convince us of the soundness of these objections. In drafting or orally giving a charge to a jury, terseness, accuracy of statement, clearness of expression, and care in covering all essential particulars are commendable qualities. They furnish safe guides for all *nisi prius* judges to follow. But absolute perfection is not required. It would indeed be difficult, if not impossible, to so frame a charge as to prevent criticism by the eagle eye of vigilant and learned counsel, or even of the appellate court, with the opportunity afforded it of mature and deliberate consideration. Substantial accuracy of the legal principles is all that the law requires. If the charge of the court in its entirety fairly covers the legal propositions necessary to give instructions upon, and is substantially correct, it is not erroneous for the court to re-

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fuse the instructions prepared by counsel, although they contain correct principles of law applicable to the case. This, in substance, has been so often declared, especially by the national courts, as to render it unnecessary to cite authorities in its support. We cannot, however, refrain from quoting with approval what is said upon this subject in 11 Enc. Pl. & Prac. 288 :

"Instructions on points which have been sufficiently covered by other instructions may properly be refused, although they are correctly drawn and applicable to the evidence. This is so whether the instruction requested is covered by the general charge, or by special instructions granted at the request of either party, or whether the mode of expression is the same or different. The duty of the court is fully discharged if the instructions embrace all the points of the law arising in the case, in the court's own language. Indeed, the practice of taking the instructions requested, and formulating a general charge to the jury, embracing all the matters of law arising upon the pleadings and the evidence, has been specially commended. In this way the law is sufficiently declared and clearly presented to the jury, without the unnecessary repetition and verbose language which so often mars special instructions, whereby jurors are confused and confounded, rather than instructed and directed. Of course, such action requires great labor, thought, and prudence on the part of the trial judge, in order that the substance of all special instructions shall be given to the jury when the questions therein presented are pertinent to the case, and that no omission shall occur by which either of the parties may be prejudiced. But, if the trial judge is willing to undertake the additional labor, the jury, as a rule, will be better instructed in their duty than by hearing read the special instructions asked for on the part of the plaintiff and the defendant. The court should simplify its directions to the jury, and make every effort to render them as free from complexity as possible. * * * The

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reason for this is obvious. Repetition tends to incumber the record and to confuse and embarrass the minds of the jury, and it is also liable to give undue prominence to the proposition repeated."

A careful examination of the record in this case has brought us to the conclusion that no prejudicial error is shown therein. The judgment of the circuit court is affirmed, with costs.

PROUD *et ux.*
v.

PHILADELPHIA & R. R. Co.

(*Court of Errors and Appeals of New Jersey, June 18, 1900.*)

Carriers of Passengers—Care Required in Inspection of Trains.*
—A railroad company is bound to inspect its trains, but not to keep up a continuous inspection, or to know at each moment the condition of every part of a train.

(Syllabus by the Court.)

ERROR by defendant to supreme court. *Reversed.*

J. W. Morgan and *S. H. Grey*, for plaintiff in error.

Howard Carrow, for defendants in error.

ADAMS, J. The plaintiffs, George S. Proud and Mary E. Proud, his wife, brought suit to recover their damages resulting from an injury received by the wife. On the night of March 8, 1899, Mrs. Proud took the defendant's 10:38 train at the Reading Terminal, in the city of Philadelphia, to go to the Huntingdon street station, in the same city. Two other ladies and a gentleman (a Mr. Springer) were in the party. The first station after leaving the Terminal is at Spring Garden street; the second, at Columbia avenue; the third, at Huntingdon street. The regular running time from the Terminal to the Huntingdon street station was 11

*See notes at end of case.

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minutes. The distance is from two to three miles. When the train had stopped at her destination, Mrs. Proud attempted to alight. As she was about to step down to the upper step from the front platform of the car in which she had ridden, Mr. Springer, who had preceded her, and was standing on the station platform, said "Look out, Mrs. Proud!" At that instant she slipped on some vomit with which the steps were covered, and which Mr. Springer had just detected and was trying to warn her against, fell, and was badly hurt. The offensive matter was not frozen, though the night was cold, which tended to show that it had been recently deposited. The platform at that place was neither very dark nor very light. Mrs. Proud, being asked, "Was the station light or dark?" answered: "I cannot remember. I do not think it is so very light there, but it was not light enough for me to see what was on the steps." Mrs. Willetta Fitzgerald, one of the party, who immediately followed Mrs. Proud, and slipped and nearly fell herself, said: "It seemed quite dark to me, coming out of a lighted car." Miss Frances Smith, another of the party, said: "It was a little dark. I could just see something on the steps." Mr. Springer said: "I got off the car, and when I turned round to assist Mrs. Proud off I saw there was something on the first step below the platform of the car. * * * The car, to the best of my knowledge and belief, stopped just in between two electric lights. The station is lighted by these,—either lamps or incandescents. I don't know which. But the car was just in between these two lights, and it was quite dark right at that point." It appeared, also, that at the moment of the accident, or almost immediately after it, the conductor was standing on the rear platform of the car next in front of that from which Mrs. Proud fell. The declaration alleges that the defendant "carelessly and negligently permitted filth and vomit to remain on the platform and steps of the car in which said Mary E. Proud was a passenger," and that this occasioned her injury. At the close of the plaintiffs' case the defendant asked the trial judge to direct a verdict for the

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defendant. This motion was denied, and exception taken. At the close of the whole case the motion was renewed, and again denied, and exception taken. The plaintiffs recovered separate verdicts. Error has been assigned on the exceptions.

The motions to direct a verdict presented to the trial judge the question whether, from the facts in proof, the jury could attribute negligence to the defendant. What, then, were the facts that bore on this question? It appears that the cars that composed this train came into the Terminal at 10:14 p. m., and that they went out at 10:38, as before mentioned. In this interval of 24 minutes, after the incoming passengers were discharged and before the outgoing passengers were admitted, it was the duty of the car cleaners to inspect the train, and see to it that it was in good order. Two witnesses were called on behalf of the defendant to prove that this duty was performed,—Charles Stuart Kelso, night foreman of car cleaners at the Reading Terminal, and Nicholas Blanch, a car cleaner employed at the same station. Kelso testified that he had charge of the cleaning of the platforms of the cars and of the 10:38 train on the night of March 8, 1899, that he personally inspected the train, and that the condition of the cars as to cleanliness when the train left the Terminal was all right. Blanch testified that he had to do with the cleaning of the 10:38 train on the night of March 8, 1899, and that it was cleaned 10 or 15 minutes before it started out. Kelso was asked specifically whether there was any vomit on the forward platform of any car on the train and answered, "No." Blanch was asked specifically whether there was any vomit on any of the platforms of the train when it left the Terminal, and answered, "No." The declaration alleges that this offensive substance was on the "platform and steps." The proof is that it was on the steps. The specific evidence of Kelso and Blanch that there was no such substance on any platform did not, therefore, in terms, met the proof. No attention was paid to

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this discrepancy by the trial judge, or by counsel on either side upon the argument in this court. Under the circumstances, it is fair to disregard it, and to assume that the testimony of these two witnesses amounts to a general averment that they made an inspection of the train 10 or 15 minutes before it started, and that the cars were in good condition, and also to a specific averment that this nuisance did not then exist. In the cross-examination of Kelso this passage occurs: "Q. You are stationed at the Terminal? A. Yes, sir. Q. And between 10:14 and 10:38 you looked after this train. Did you do it yourself, or have men under you do it? A. I did it myself. I inspect all the trains. Q. Well, now, after you get through looking at them, who looks after them? A. The train crew." There is no evidence as to the number of passengers who alighted from and who entered the train at the two stations intermediate between the Terminal and Huntingdon street, or to show whether any of them traversed the forward platform of the car in which Mrs. Proud was riding, or used the steps on which she afterwards fell. Nor is there any evidence as to the movements of any member of the train crew on the run from the Terminal to the place of the accident, or as to the number of cars or of brakemen. A railroad company has two means of informing itself as to the condition of the cars of one of its trains: First, inspection made while the train is at rest, by persons assigned to that service; and, secondly, the cursory and current observation of those members of the train crew whose duty requires them to be on and in the cars while the train is in motion, and who are expected, as they go about their business, to have an eye to their surroundings. Inspection, to be valuable, must be thorough and deliberate. The observation that the conductor and brakemen on a moving train may reasonably be relied on to make is necessarily incidental to the performance of other duties, and so is less exhaustive than regular inspection. This being the scope of the defendant's obligation to inform itself as to the condition of this train, it

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is evident that there was an obstacle to the plaintiffs' recovery. The defendant had duly performed its duty of formal inspection, and there was no evidence to show that, in the brief interval that had elapsed since the inspection was made, either the conductor or any one of the brakemen had been so situated, in the discharge of his duties, that observation would have disclosed to him the presence of this substance upon these front steps of the car in which Mrs. Proud was a passenger. The platform and steps were in themselves unobjectionable. Their condition had been inspected and approved within half an hour. The nuisance was one of the existence of which neither the conductor nor a brakeman would naturally have notice or warning. The evidence, therefore, would not have justified the jury in concluding that the defilement of the steps was a thing that the employees of the defendant should have apprehended or looked for or discovered. It is against dangers which may reasonably be expected by a carrier that it must exercise a high degree of care on behalf of its passengers. As the proof does not show that due care would have prevented the accident, it does not support a verdict for the plaintiffs. The presence of snow or ice on the steps of a public vehicle makes a case that both resembles and differs from that now before us. The resemblances are obvious. One difference is that both the common carrier and the passenger are apt to have notice of the presence of snow or ice, whereas no one had warning of this deposit. In *Palmer v. Railroad Co.*, 111 N. Y. 488, 18 N. E. 859, 2 L. R. A. 252, it was held that a railroad company is not bound to keep up a continuous inspection of a train during the prevalence of a snowstorm. Other cases more or less pertinent are *Kelly v. Railroad Co.*, 112 N. Y. 443, 20 N. E. 383, 3 L. R. A. 74; *Weston v. Railroad Co.*, 73 N. Y. 595; *Neslie v. Railway Co.*, 113 Pa. St. 300, 6 Atl. 72; *Fearn v. Ferry Co.*, 143 Pa. St. 122, 22 Atl. 708, 13 L. R. A. 366; *Gilman v. Railroad Co.*, 168 Mass. 454, 47 N. E. 193; *Shepherd v. Railway Co.*, 25 Law T. (N. S.) 879. The judgment is reversed.

Notes

Carriers of Passengers—Appliances—Inspection.—It is the duty of carriers of passengers to exercise care and vigilance in examining their appliances and keeping them in proper repair and safe condition. *Illinois C. R. Co. v. Phillips*, 49 Ill. 234; *Terre Haute & I. R. Co. v. Sheeks (Ind.)*, 56 N. E. Rep. 434; *Texas & St. Louis R. R. Co. v. Suggs*, 21 Am. & Eng. R. Cas. 475, 62 Tex. 323; *International & G. N. R. Co. v. Halloren*, 3 Am. & Eng. R. Cas. 343, 53 Tex. 46, 37 Am. Rep. 744.

But not to make such a minute examination of the car trucks as will defeat the purposes of through traffic. Nor is its duty to make a minute examination of the whole of a truck merely because a defect has been discovered in part of it. *Richardson v. Great Eastern R. Co.*, 24 W. R. 907, L. R. I. C. P. D. 342, 35 L. T. 351.

The question as to what is the requirement of duty in regard to frequency of examination is dependent upon the liability to impairment and the consequences which may be apprehended as the result of defective condition. *Palmer v. Delaware & H. Canal Co.*, 44 Am. & Eng. R. Cas. 298, 120 N. Y. 170, 24 N. E. Rep. 302, 30 N. Y. S. R. 817.

Same—Same—Same—Sufficiency a Question of Fact.—Whether the system and manner of executing its duty in examining its machinery and appliances are all that may be required of a carrier cannot be measured by any rule of law to be applied by the court, but that question is one of fact for the jury to determine upon proper instruction. *Palmer v. Delaware & H. Canal Co.*, 44 Am. & Eng. R. Cas. 298, 120 N. Y. 170, 24 N. E. Rep. 302, 30 N. Y. S. R. 817; *Manser v. Eastern Counties R. Co.*, 3 L. T. 585; *Thatcher v. Great Western R. Co.*, 4 U. C. C. P. 543; *Chesapeake & O. R. Co. v. Howard (U. S.)*, 18 Am. & Eng. R. Cas., N. S., 660. See *note*, 16 Am. & Eng. R. Cas., N. S., 126.

Same—Same—Same—Same—Effect of Inspection.—A railroad company cannot discharge its liability to a passenger by showing that its agents inspected the cars before starting out on the trip, if in fact the train was not in proper condition with respect to the safety of the passenger. *Keating v. Detroit, B. C. & A. R. Co. (Mich.)*, 62 N. W. Rep. 575.

Same—Same—Same—Latent Defect.—A railroad company which has used due care in providing proper appliances is not liable for injuries to a passenger resulting from a latent defect not capable of detection by ordinary means of examination. *Gilbert v. North London R. Co.*, 1 C. & E. 31; *Readhead v. Midland R. Co.*, 8 B. & S. 371, 36 L. J. Q. B. 181, L. R. 2 Q. B. 412, 15 W. R. 831, 16 L. T. 485; *Searle v. Laverick, L.* 9 Q. B. 122, 43 L. J. Q. B. 43, 30 L. T. 89, 22 W. R. 367; *Richardson v. Great Eastern R. Co.*, L. R. 1 C. P. D. 342; *Stokes v. Eastern Counties R. Co.*, 2 Fost. & Fin. 691; *Dube v. The Queen*, 3 Can. Exch. 147; *West-*

Notes

ern Ry. Co. of Ala. *v.* Walker, 113 Ala. 269, 22 So. Rep. 182; Pittsburg, etc., R. Co. *v.* Thompson, 56 Ill. 138; West Chicago St. R. Co. *v.* Stephens, 66 Ill. App. 303; Toledo, W. & W. R. Co. *v.* Beggs, 85 Ill. 80; Irleson *v.* Southern Pac. Co., 42 La. Ann. 643, 44 Am. & Eng. R. Cas. 319; Ladd *v.* New Bedford R. Co., 119 Mass. 412, 20 Am. Rep. 331; Ingalls *v.* Bills, 9 Met. (Mass.) 1, 43 Am. Dec. 346; Grand Rapids & I. R. Co. *v.* Huntley, 38 Mich. 537; Yerkes *v.* Keokuk, etc., Co., 7 Mo. App. 265; Curtis *v.* Rochester & S. R. R. Co., 18 N. Y. 536; Dougan *v.* Champlain T. Co., 56 N. Y. 1; Cocheron *v.* North Shore, etc., Ferry Co., 56 N. Y. 656; Loftus *v.* Union Ferry Co., 22 Hun 33; Meier *v.* Pennsylvania R. Co., 64 Pa. So. Rep. 225, 3 Am. Rep. 581; Fordyce *v.* Withers, 20 S. W. 766, 1 Tex. Civ. App. 540; Texas & P. R. Co. *v.* Hamilton, 26 Am. & Eng. R. Cas. 182, 66 Tex. 92; Texas & P. R. Co. *v.* Buckalew (Tex. Civ. App.), 34 S. W. 165.

Same—Same—Same—Early Rule.—The contrary was held in the English case of Sharp *v.* Gray, 9 Bing. 457, 23 E. C. L. 331, 2 M. & Scott 621, and in the early New York cases, Alden *v.* New York C. R. Co., 26 N. Y. 102; Brehm *v.* Great Western R. Co., 34 Barb. (N. Y.) 256. These early decisions have been overruled by the later cases. See cases cited, *supra*.

Same—Same—Same—Manufacturer's Negligence.—The manufacturer of the appliances of a carrier of passengers is considered the agent of the carrier, and the carrier is responsible for injuries to a passenger resulting from a defect which the manufacturer might have discovered by the usual tests. Burns *v.* Cork, etc., R. Co., 13 Ir. C. L. 543; Frances *v.* Cockrell, L. R. 5 Q. B. 184; Crote *v.* R. Co., 2 Ex. 251; Pyne *v.* Ry. Co., 2 F. & F. 619; McGuire *v.* The Golden Gate, 1 McAll 104; Treadwell *v.* Whittier, 80 Cal. 574, 13 Am. St. Rep. 175; Illinois Cent. R. R. Co. *v.* Phillips, 49 Ill. 234; Gillenwater *v.* Madison & I. R. Co., 5 Ind. 340; Pittsburg, etc., R. Co. *v.* Nelson, 51 Ind. 150; Hegeman *v.* Western R. Corp., 13 N. Y. 9, 64 Am. Dec. 517; Curtis *v.* Rochester, etc., R. R. Co., 18 N. Y. 538, 75 Am. Dec. 258; Perkins *v.* New York Cent. R. R. Co., 24 N. Y. 219, 82 Am. Dec. 282; Bissell *v.* New York Cent. R. R. Co., 25 N. Y. 445, 82 Am. Dec. 369; Brown *v.* N. Y. Cent. R. Co., 34 N. Y. 404; McPadden *v.* N. Y. Cent. R. Co., 44 N. Y. 478; Caldwell *v.* N. J. Steamboat Co., 56 Barb. 425, 47 N. Y. 287; Philadelphia, etc., R. Co. *v.* Anderson, 94 Pa. St. 351, 39 Am. Rep. 787, 6 Am. & Eng. R. Cas. 407.

The contrary doctrine was held in Nashville, etc., R. Co. *v.* Jones, 9 Heisk. (Tenn.) 27; Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537.

Same—Degree of Caré.—As to the degree of care required of carriers of passengers, see generally *note*, 9 Am. & Eng. R. Cas., N. S., 652 *et seq.*

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CENTRAL OF GEORGIA RY. CO.

v.

LIPPMAN.

(Supreme Court of Georgia, June 5, 1900.)

Carriers of Freight—Liability—Right to Limit Liability.—The liability of a common carrier of goods is that of an insurer, and in cases of loss no excuse avails such carrier, unless occasioned by the act of God or the public enemies of the state. He may not limit his legal liability by a notice to the shipper, but he may, with certain restrictions, make an express contract, and both parties entering into it will be bound by its terms.

Carriers of Passengers—Liability—Power to Waive or Release.²—The liability of a carrier of passengers is not that of an insurer, but such carrier is bound by law to extraordinary diligence to protect the lives and persons of his passengers. This duty he cannot waive or release, even by an express contract. Being one in which the public has an interest, public policy forbids such a waiver or release.

Same—Liability to Passenger on Freight Train—Limiting Liability.—A carrier who received a passenger on one of its freight trains is bound by the same standard of diligence as if the passenger were being transported on a regular passenger train. What will amount to extraordinary diligence varies with the character of the train. A passenger who voluntarily seeks to be transported on a freight train takes the risk of the usual and necessary jolts and jars which occur in the operation of such train, but the carrier is not relieved from the use of extraordinary diligence to the passenger to prevent unusual and unnecessary jolts and jars. An express contract entered into by the carrier and the passenger, under the terms of which the carrier is released from all liability to the passenger for personal injuries received while a passenger on such freight train, is, in effect, a contract by which the carrier undertakes to relieve itself from the consequences of the negligence of itself and servants, and cannot be enforced.

(Syllabus by the Court.)

*See note at end of case.

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ERROR by defendant from Jones county superior court.
Affirmed.

Dessau, Harris & Birch, for plaintiff in error.

Guerry & Hall, for defendant in error.

LITTLE, J. Lippman instituted an action against the Central of Georgia Railway Company to recover damages for injuries which he alleges he sustained while a passenger holding a ticket which entitled him to be carried between two stations on the line of the defendant's railroad, in the county of Jones. A demurrer was filed to the petition, which was overruled, and the case proceeded to trial, and resulted in a verdict for the plaintiff in the sum of \$1,500. Exceptions *pendente lite* were made to the overruling of the demurrer, which were duly certified and entered of record, and an assignment of error thereon is made in the bill of exceptions. After the rendition of the verdict, the defendant made and filed a motion for a new trial, which was overruled, and he excepted. The evidence for the plaintiff made substantially the following case: On the 14th of October, 1897, plaintiff entered a way freight train of the defendant at Gray's station, to be carried to Roundoak, having a mileage ticket entitling him to passage on that train, for which he had paid the price charged by the company. There was no car provided for passengers except the caboose, in which seats were placed. Soon after plaintiff entered the caboose, the train suddenly commenced backing, and then made a violent jerk which threw plaintiff to the floor on his right side. He was rendered unconscious, and was unable to arise until assisted by the flagman. On arriving at Roundoak, he had to be assisted from the car. Evidence was also introduced as to the extent of the injuries sustained by the defendant in error, their nature and effect on his earning capacity, as well as their permanency, and as to the loss of income thereby, his pain and suffering, and the expense occasioned for medicine and nursing. The defendant intro-

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duced evidence tending to rebut that of the plaintiff as to the fact of the injury, and that there was nothing unusual in the movement of the cars by which the plaintiff claimed to have been injured. This evidence, however, disclosed the fact that the plaintiff was injured—at least to a certain extent—by his fall, but it was a contested question whether the fall was occasioned by the movement of the cars of the train, or by a sudden attack of sickness occurring to the plaintiff at the time, and also whether the plaintiff was occupying his proper place as a passenger in the car, and whether his fall was attributable to his own or the company's negligence. It is not necessary that further reference to the oral evidence, which is voluminous, should be made, in order that the points decided may be understood. The ticket in possession of the plaintiff at the time he was injured, and under which he claimed the rights of a passenger on said train, and which he introduced in evidence, reads as follows:

"Mileage Ticket No. 3,756. P. Lippman, Macon, Ga., is entitled to travel 1,000 miles on the Central of Georgia Railway Company upon the conditions named in the contract attached and made a part hereof. This ticket will not be duplicated if lost. [Signed] J. C. Haile, Genl. Passenger Agt.

"Not good unless stamped here. [Stamp of the company.]

"Contract. The conditions upon which this coupon mileage ticket is sold by the Central of Georgia Railway Company and purchased by the holder are as follows: * * * (4) That it is good on either passenger or way freight trains, and entitles the purchaser to stop only at stations which by the time card are designated as regular stopping places of the train on which it is presented. (5) That, for and in consideration of being permitted to use this mileage ticket for passage on the way freight trains, I hereby release the company from all liability in case of personal injury, or for loss or damage to baggage, while using said freight trains. * * * (17) This ticket expires one year from date of sale.

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I have purchased this ticket and agree to use it subject to the above conditions. [Signed] P. Lippman."

On the list of stations there appeared Gray's Station and Roundoak, designated as regular stopping places. A number of grounds, in addition to those assigning as error that the verdict was contrary to the law and evidence, are set out in the motion. After a careful examination of these, read in connection with the evidence and charge of the court applicable to each, we find it necessary only to consider and pass upon those specifically enumerated hereafter. In relation to those grounds of the motion not thus specifically considered, it is sufficient, in a general way, to say that, in our opinion, there was no error in overruling the demurrer which was filed to the petition. The petition does, as we read it, clearly set out that the jerk or sudden stopping of the cars which it is alleged caused the injury was wholly unnecessary, and caused by the negligence of the defendant. Nor can we say that the verdict was contrary either to the law or to the evidence. It was very clearly shown that the plaintiff was severely injured by a fall, while a passenger on the defendant's train. According to his testimony, such fall was occasioned by a very violent and unusual jerk or sudden stoppage of the cars. Whether such jerk or sudden stop did in fact cause the injury which he received, or were occasioned by other causes, and whether the alleged sudden and violent movements of the train were unusual and unnecessary, as well as the extent of the injuries, and the effect of them upon the plaintiff, were questions of fact, and taking the evidence as a whole, including that going to show the character of the injuries sustained, there was sufficient evidence to warrant the verdict. Nor can we say that the verdict is excessive. There was evidence of pain, suffering, and, indeed, of permanent injury and reduction of capacity to labor. The sum returned by the jury was that which was agreed on as compensation for all these elements of damage which in cases of this character fix the measure of recovery, and, in our opinion, it does not necessarily appear to have exceeded the

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amount which the jury were authorized to fix under the evidence in the case. Nor do we think there was any error in the admission of the evidence of the plaintiff and of the physicians as to the detailed character and effect of the injury received. The allegations of the petition are that the plaintiff was seriously and permanently injured; that he was thrown from his seat, and for a considerable distance, upon the floor, so heavily as to render him unconscious; that he was deprived of the power of locomotion, and could not raise himself from the floor for some time; that he was lifted therefrom by others; that by so being thrown upon the floor he was seriously and permanently injured in his right hip; that the same was shocked and bruised and otherwise injured by the fall; that he has never recovered therefrom, he goes about with great difficulty, and his injuries are permanent. While the injury to the hip and other portions of the body might have been set out more in detail, it is a fact known to laymen, as well as to experts, that injuries to the hip frequently shorten the leg, and, as we understand the evidence objected to, the testimony of the experts was directed to the point where the bones of the leg join the body, which is included, by common parlance, in the general word "hip," when speaking of the human body. For reasons which will appear from the further discussion of this case, there was no error in the refusals to charge, nor in the failure of the court to charge certain legal principles. Taken as a whole, the charge was fair and comprehensive, and embodied, as we think, correct principles of law.

Without further reference to the grounds of the motion to which we have thus generally made reference, we come now to especially consider two of the grounds which are based on the instructions given to the jury, and which embody certain principles as being the law applicable to the facts of the case, the correctness of which is denied by the plaintiff in error: (1) Error is assigned to the following charge of the court: "Counsel upon both sides have insisted on and invoked the construction of the court upon article 5,

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under the written contract which has been offered in evidence, *viz.*: 'That, in consideration for being permitted to use the mileage ticket for passage on way freight trains, I hereby release the company from all liability, in case of personal injury, or for loss or damage to baggage, while using said freight train.' The court charges you that the railway company could not stipulate against its own negligence. Should you believe from the evidence in the case that the plaintiff was injured, and that he was injured by the negligence of the railroad company, the court charges you the article referred to would not release the railroad company from liability." Passing for the present reference to the authorities cited by plaintiff in error, to establish the proposition that a railroad company may contract for exemption from responsibility for injuries to passengers riding on freight trains, we come to consider the meaning and application of the provisions of law which are contained in section 2276 of the Civil Code of this state, which is cited as authority for the proposition that the court erred in charging the jury as heretofore set out. That section reads as follows: "A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold. He may make an express contract and will then be governed thereby." Undoubtedly, if a carrier of passengers is a common carrier, within the contemplation of this section of the Code, and if the term "legal liability" refers to the obligation of the carrier of passengers to exercise extraordinary diligence to protect the lives and persons of the passengers, then, while the carrier may not limit such liability by notice, he may do so by an express contract, in which case the rights of the parties will be governed by the terms of the contract. Such a construction would give the right to a railroad company by express contract to limit its obligation to use extraordinary diligence to protect a passenger. In our judgment, for a number of reasons, no such construction can be placed upon this section of the Code, nor do the provisions contained therein, as we think, apply to a carrier of passengers.

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Just here it may be well to consider for a moment the question whether certain previous adjudications by this court do not rule a contrary doctrine, as it is claimed they do. The cases referred to are *Phillips v. Railroad Co.*, 93 Ga. 356, 20 S. E. 247; *Boyd v. Spencer*, 103 Ga. 828, 30 S. E. 841; *Railway Co. v. Barlow*, 104 Ga. 213, 30 S. E. 732; and *Railway Co. v. Ricks (Ga.)*, 34 S. E. 570. It is very freely admitted that in some, if not in all, of these cases, this court applied the provisions of this section to a passenger carrier; but the question whether the terms of this section had such application was not made in any of them, nor was that question decided in any one of these cases. While much of the language used, both in the headnotes and in the opinions, seems to directly deal with the section as having application to passenger carriers, we are only to take the rulings made as finally decisive of the issues raised and presented in the several cases. It was assumed by all the parties in the cases referred to that the section did have such application, and, so agreeing, the issues raised and determined were on the facts. In the *Phillips Case*, *supra*, the point involved was whether there was an express contract which rendered the undertaking of the company with reference to return transportation conditional upon acts to be done at the completion of the original trip, and before the return trip was entered upon; and this court there ruled that there was no written evidence of such contract, and that, so far as the parol evidence went, it tended to disprove, rather than to prove, the making of any express contract whatever. That was the point on inquiry in that case. The question in the case of *Boyd v. Spencer* was whether a mere notice on a ticket, to the effect that the ticket expired at a given time, to which the attention of the passenger was not called at the time of the purchase of the ticket, would amount to an agreement between the passenger and carrier that the ticket would be used in that time, so as to become "an express contract," within the meaning of section 2276 of the Civil Code. The question then for decision was stated by MR. JUSTICE COBB

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in the opinion, on page 830, 103 Ga., and page 842, 30 S. E., to be "whether, under the plaintiff's evidence, it has been shown that he is not entitled to recover because a special contract had been made with him limiting the time in which his ticket should be used." No other question was then argued by counsel, discussed in consultation, or intended to be ruled, when that decision was rendered. The opinion must be read in the light of the actual question then under discussion, and any language therein which apparently rules any other question is purely obiter, and is not binding as authority. In the case of Barlow the ruling was that if one entered the train of a carrier, not for the purpose of making the journey called for by the ticket, but for the purpose of being put off so as to make a case for damages, and he is ejected, he is entitled to nominal damages only, and the ruling of the court was distinctly put on the proposition that there was evidence to support this state of facts, and it was therefore error to charge the jury in language which, in effect, deprived the defendant of the benefit of this defense. The case of Railway Co. v. Ricks, *supra*, was to the effect that one who had purchased a ticket having on its face an express stipulation that it would be good for passage only during a specified period, and who, in consideration of it having been sold at a reduced rate, assented to the stipulation, had no legal cause of complaint against the railway company for ejecting him, after the expiration of the limit of time, on his refusal to pay fare. While, as before stated, some of the conclusions reached, and much of the language used in those cases, are apparently contrary to what is here ruled, yet, as the decision made in none of those cases involved the question which we pass upon here, they are not controlling as to such question.

Resuming consideration of the proposition that the provisions of the section of the Code now under consideration do not apply to a carrier of passengers, it is significant that under this section the carrier who may limit his legal liability by express contract is denominated a "common

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carrier." These provisions were taken from the common law, and first became a part of our written law by the adoption of the Code of 1863, and are found in section 2041 of that Code in precisely the same language as they appear in the Code of 1895. The Code of 1863 was under the act of December 9, 1858, compiled by codifiers charged with the duty of preparing a code of laws for this state which should embrace, in a condensed form, the laws of Georgia, whether derived from the common law, the constitution of the state, the statutes of the state, the decisions of the supreme court, or the statutes of England of force in this state. To ascertain the meaning of the section, therefore, reference is not to be had to a legislative intent, because the law there embraced was not the creation of our legislative body. Of course, under the act adopting the Code of 1895, it is made to assume the dignity of written law. But, nevertheless, it cannot, as written law, have any other and different application than it had at common law, because, in incorporating it into the Code, its meaning was not changed, nor the application of the principles it contains extended. The term "common carrier" did not at the common law embrace a carrier of passengers. Neither does it under the definition found in the Code in connection with section 2276. Nor are the liabilities of a common carrier and a carrier of passengers the same, either at common law or under our statutes. A "common carrier" is defined by Bouvier to be "one whose business, occupation or regular calling it is to carry chattels for all persons who may choose to employ and remunerate him." The same author defines another class of carriers, whom he denominates "common carriers of passengers," to be "such as undertake for hire to carry all persons indifferently who may apply for passage, so long as there is room, and there is no legal excuse for refusing." Mr. Hutchinson, in his treatise on the Law of Carriers (section 47), defines a "common carrier" to be "one who undertakes as a business, for hire or reward, to carry from one place to another the goods of all persons who may apply for such carriage." The same

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author, in section 497, declares that carriers of passengers, as to the persons of those whom they carry, are not common carriers. Mr. Greenleaf, in the second volume of his work on Evidence (section 211), under the inquiry as to who is a common carrier, says that "the defendant is proved to be a common carrier by evidence that he undertakes to carry for persons generally, exercising it as a public employment, and holding himself out as ready to engage in the transportation of money or goods for hire as a business, and not as a casual occupation." Again, in the same section, he declares that "hackney coachmen and others, whose employment is solely to carry passengers, are not regarded as common carriers in respect of the persons of the passengers." But it is not necessary that we should go further in order to show that at common law the definition of a common carrier was confined to one who transported goods. All the text writers, so far as we know, confine this appellation to such carriers. Indeed, our own Code, in sections 2263 and 2264, defines a "common carrier" to be one who undertakes to transport goods for a compensation, and who pursues the business constantly or continuously for any period of time, or any distance of transportation. These sections were likewise taken from the common law, and in connection with section 2276, the meaning of which we are now considering, were codified and placed together in the Code of 1863; and, to show that a distinction was meant to exist, another provision of the common law in reference to carriers of passengers was placed in immediate connection with them, in the Code of 1863 at the same time, and appears now as section 2266 of our Civil Code, which declares that a carrier of passengers is bound also to extraordinary diligence on behalf of himself and his agents to protect the lives and persons of his passengers. The use of the word "also" in the section of the Code, following the definition of a "common carrier," and declaring that common carriers shall be bound to extraordinary diligence, is clearly indicative of the legal distinctions which existed between common carriers and passenger carriers.

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If the subject is examined, no possible doubt can remain that at common law the term "common carrier" did not embrace a carrier of passengers. Bouv. Law Dict. tit. "Common Carrier"; Hutch. Car. § 47. See, also, Bouv. Law Dict. tit. "Common Carriers of Passengers." Now, as the provisions of the Code taken from the common law deal separately with the liabilities of common carriers and carriers of passengers, and make a distinction between these carriers by designating a common carrier as a carrier of goods, this common-law meaning given to the words "common carrier" must go with them into the Code, when the meaning of a cognate section, which limits the right to fix liability to common carriers, is to be ascertained. At common law, and under the statute (Code, § 2264), a common carrier was an insurer of the goods which he undertook to transport. Such was his legal liability, and he was made to answer in dollars and cents for the value of goods lost or destroyed, unless such loss or destruction was occasioned by the act of God or the enemies of the king. No such liability extends to the carrier of passengers, and, strange as it may seem, both at common law and under our statute, the responsibility of a passenger carrier for the lives and persons of his passengers is less in degree than a common carrier in the transportation of goods. The former is bound only to extraordinary diligence; the latter, not only to extraordinary diligence, but, if the goods are injured or destroyed, no excuse avails him, unless such injury or destruction was occasioned by the act of God or the public enemies of the state. The reasons are obvious: A box of goods remains where it is placed; a man has locomotion and a will. When a carrier receives the first, he has absolute control; while his control of the passenger is limited to the promulgation of rules, which may or may not be observed. In the days of CHIEF JUSTICE MARSHALL, a case came before the supreme court of the United States which involved the determination of the question whether the liability of the carrier which had received for transportation

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certain negro slaves, some of whom were drowned, was that of a common carrier or a carrier of passengers. *Boyce v. Anderson*, 2 Pet. 150, 7 L. Ed. 379. It was contended that the liability of the carrier was that of a common carrier. In holding adversely to this claim, the chief justice said: "In the nature of things, and in his character, the slave which was being transported was more like a passenger than a package of goods; that he had volition and feelings, which could not be disregarded; that these properties could not be overlooked in conveying him from place to place; that he could not be stowed away as a common package; that, being left at liberty, he might escape; and that the carrier did not have, and could not have, the same absolute control over him that it had over inanimate matter." In his *Treatise on the Law of Notice*, Mr. Wade, in section 531, treating the subject of notice by carriers limiting their liability, says: "The carriers' notices by which their liability is sought to be limited have reference (1) to the notice by which they endeavor to qualify or restrict their responsibility, imposed by law, as special insurers of the articles committed to their charge; (2) the notice by which their responsibility as carriers is terminated." Section 2276 simply prescribes the common-law rule applicable exclusively to carriers of goods, and the legal liability referred to in the section is the liability which the law imposed on such carriers as insurers of the goods which they undertook to transport, and did not have, and could not have, from the difference in the nature of the liability of each, any reference to a carrier of passengers. But it may be said that, as by the provision made in the section a common carrier could not limit his legal liability by entry on "tickets sold," it was the contemplation that such an inhibition should apply to passenger carriers because tickets are only sold to and for the transportation of passengers. The reply to this suggestion is that as to the baggage of passengers the carrier is under liability as a common carrier,—that is, an insurer of goods,—while a different rule prevails as to the liability for

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injury to passengers. Bouv. Law Dict. tit. "Common Carriers of Passengers"; Story, Bailm. §§ 498, 590, 604. It is only on the ground of negligence that the carrier of passengers is held liable. 2 Greenl. Ev. § 222. We take it, inasmuch as the section of the Code confines the power to common carriers, that it has reference to the baggage or personal effects of the passenger which it undertakes to transport when the rule is extended to entries on tickets sold. This view is further strengthened because of the fact that while the carrier cannot limit his liability, as we have seen, for extraordinary diligence to the passenger, he may by express contract relieve himself of the law which makes him an insurer of the baggage of that passenger. By section 2280 of our Civil Code, it is provided that the carrier of passengers is responsible for baggage placed in his custody; and by section 2288 of the same Code it is provided that a carrier of passengers may limit the value of the baggage to be taken for the fare paid, but that in case of loss, though no extra freight has been demanded or paid, the carrier is responsible for the value of the baggage lost. When these sections of the Code are construed together, and in connection with 2276, they will be found to be in entire harmony. This court in several cases has had occasion to make application of the section of the Code now under consideration, and in each instance it has been treated as applying, even with the words "tickets sold" incorporated, to a carrier of goods. In the case of *Dibble v. Brown*, 12 Ga. 224, this court, through JUDGE NISBET, said: "The question is mooted in the books whether such persons, as regards baggage accompanying travelers, are liable as common carriers or as private persons engaging to carry for hire. If the former, they are liable as insurers against loss, except when occasioned by the act of God and the public enemies; and, if the latter, they are bound only to due and reasonable skill and diligence in their undertaking. It is, however, now well settled that they are liable for baggage as common carriers. Without other compensation than the fare for passengers, they are liable for their

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baggage as common carriers are liable for goods delivered to them for transportation; that is, they are liable for baggage at all events, except when destroyed by the act of God or irresistible accident and the public enemies,"—citing a number of cases. It is therefore not illogical that the Civil Code should provide, as it does in section 2288, that a carrier of passengers may limit the value of the baggage to be taken for the fare paid, because such a carrier of passengers is, as to the baggage of the passenger, a common carrier; and it would seem, under the operation of section 2276, that while this limit of liability cannot be made by a notice given, nor by an entry on the ticket sold to the passenger, it may be accomplished by an express contract made between the passenger who owns the baggage and the carrier who receives it, and that both will be governed by the terms of such contract. In the case of *Express Co. v. Newby*, 36 Ga. 635, this court ruled that an express company which pursues continuously the business of transporting goods was a common carrier, and, quoting exactly the section of the Code under consideration, declared that "our Code has incorporated the rules of the common law, as expounded in Georgia, in *Fish v. Chapman*, 2 Ga. 349, and with it we are satisfied." A reference to the case in 2 Ga. will show a very learned and comprehensive treatment of the right of a common carrier to limit his liability by notice. In the case of *Express Co. v. Purcell*, 37 Ga. 103, CHIEF JUSTICE WARNER, after declaring that the liability of a common carrier is regulated by law on the ground of public policy, and that he could not be permitted by his own act to limit the effect and operation of that law, and thereby defeat that public policy, quotes the section of the Code now under consideration, and declares that "the legal liability of a common carrier as defined by the law is one thing; his legal liability as a common carrier under an express contract made with the shipper is another and quite a different thing. In the latter case his liability will depend upon the terms of that express contract, and will be governed by it." And further on in the

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same opinion he says: "The common carrier and the shipper may enter into an express contract, outside of the receipt given for the goods, in regard to the carrier's liability, and then, both parties having a fair opportunity to understand the terms of the contract, will be governed by it." Again, in the case of *Mosher v. Express Co.*, 38 Ga. 42, CHIEF JUSTICE WARNER, after quoting the Code of 1863, which is in the exact language of that now under consideration, says: "This section of the Code was considered and construed by this court at the last term in two cases (*Express Co. v. Newby*, and *Express Co. v. Purcell*). This provision of the Code is, in our judgment, a wise and salutary provision, intended to protect the public from imposition and surprise in the hurried transaction of business with these express companies, in the forwarding of small parcels, as well as valuable packages, by all sorts of people, some of whom might not be able to read the printed stipulations annexed to the receipt given for the goods, and, if they could read them, would not be able to comprehend the legal effect thereof."

We have taken much time, and occupied a good deal of space, in endeavoring to show that the provisions of this section of the Code are not applicable to a carrier of passengers.

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sengers—Liabil-
ity—Power to
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lease.

We have done so because the question is an important one, and also because a different ruling would seem to have been made in other cases decided by this court to which reference has been made. But a final and conclusive answer to the proposition that this section does not apply to a carrier of passengers is found in the generally accepted proposition that a carrier of passengers for hire cannot avoid, even by an express contract, his liability for negligence. So far, we do not know that it has ever been doubted in this state that a carrier of passengers could, by contract or otherwise, avoid his liability for the negligence of himself or servants. The compilers of the *American & English Encyclopedia of Law* declare that such is the well-settled rule by the decisions of the federal court and the great weight of authority in the

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several states, and for this proposition is cited: *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; *Abrams v. Railway Co.*, 87 Wis. 485, 58 N. W. 780; *Railroad Co. v. Ashley*, 14 C. C. A. 368, 67 Fed. 209; *Railroad Co. v. Curran*, 19 Ohio St. 1; *Libby v. Railway Co.*, 82 Mo. 292; *Railway Co. v. Ivy*, 71 Tex. 409, 9 S. W. 346; *Piedmont Mfg. Co. v. Columbia & G. R. Co.*, 19 S. C. 353. In the case of *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, the supreme court of the United States laid down three propositions on this subject: First, that a common carrier could not lawfully stipulate for exemption from responsibility when such exemption was not just and reasonable in the eye of the law; secondly, that it is not just and reasonable, in legal contemplation, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants; thirdly, that these propositions apply to both carriers of goods and carriers of passengers for hire, with special force to the latter. To the same effect, see *Railway Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869; *Railway Co. v. McGown*, 65 Tex. 640; *Jacobus v. Railway Co.*, 20 Minn. 125 (Gil. 110). JUDGE RAY, in his work on *Negligence of Imposed Duties* ("Passenger Carriers") on page 262, states the general rule to be that "a carrier cannot by contract exempt itself from liability for injuries and damages resulting from its own negligence or negligence of its servants. The public have an interest in the contract, which a private individual cannot waive,"—citing *Willis v. Railway Co.*, 62 Me. 488; *Mann v. Birchard*, 40 Vt. 326; *Squire v. Railroad Co.*, 98 Mass. 239; *Railroad Co. v. Oden*, 80 Ala. 38; *Grogan v. Express Co.*, 114 Pa. St. 523, 7 Atl. 134. Mr. Wood, in the third volume of his *Law of Railroads* (section 425), says: "In most of the states, while the carrier may impose reasonable limitations upon his liability, he cannot by any provision, however explicit or direct, screen himself from liability for loss or injury resulting from his own or his servants' negligence. The principal ground upon which the right of a car-

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rier to limit his liability by contract in any manner he pleases can be denied is that by reason of the public character of his business such contracts are opposed to public policy." And Mr. Fetter, in his treatise on the Law of Carriers of Passengers, in section 389, states, on authority, that the American rule is that common carriers cannot, even by express contract, limit their liability for their own or their servants' negligence in respect to passengers for hire, and that this rule has been adopted in the great majority of the American States as a part of the common law; citing *Railway Co. v. Selby*, 47 Ind. 471; *Doyle v. Railroad Co.*, 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844; *Jones v. Railway Co.*, 125 Mo. 666, 28 S. W. 883, 26 L. R. A. 718; *Railroad Co. v. Chenewith*, 52 Pa. St. 382. See, also, *Cook v. Railroad Co.*, 72 Ga. 50; *Railroad Co. v. Keener*, 93 Ga. 808, 21 S. E. 287; *Railroad Co. v. Gann*, 68 Ga. 353. While the Georgia cases cited above are mainly applicable to cases respecting the carriage of goods, the principle of an inability to contract against their own negligence is equally applicable, but with greater force, to a carrier of passengers for hire. Even if section 2276 of the Code applied to the carriers of passengers, it would not avail the plaintiff in error anything under the contract which is now being considered. That section refers to the limitation of liability by common carriers. If the contract which was entered into by the plaintiff in error and the carrier in this case were to be given the full effect it is claimed to have, it would not operate as a limitation, but as a complete and full release of liability, not only from the negligence of the company or its servants, but from all other causes as well. The words of the contract are, "I hereby release the company from all liability in case of personal injury * * * while using said freight train." Even if the right to limit his liability by express contract had been given to a passenger carrier, such authority could not be made to extend to an exemption from all liability. We are of the opinion that the contract set up by the defendant in the court below could not have the legal effect of barring the plaintiff's right to re-

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cover damages for injuries which he sustained while a passenger on the car by reason of the negligence of the servants and employees of the defendant.

2. It is complained that the court erred in charging the jury that "it is extraordinary diligence to which the court especially directs your attention, because the railroad companies are bound to use extraordinary diligence

towards the safety of a person traveling upon their cars. Regardless of the mode of conveyance, a common carrier in each case is bound to

Same—Liability
to Passenger on
Freight Train—
Limiting Liability.

the exercise of extraordinary care and diligence towards the conveyance of passengers." The specific error alleged is that the charge ignored the written contract, and held defendant to extraordinary diligence, though the plaintiff had contracted in writing that he would not hold the company liable for personal injuries received while he was using the freight train. We see no error in this instruction to the jury. A carrier of passengers is bound to extraordinary diligence, on behalf of himself and his agents, to protect the lives and persons of his passengers. We have endeavored to show that he could not by express contract waive this obligation which the law puts upon him. If the railroad company receives a passenger on one of its freight trains, the character of the train upon which he is received does not fix its liability, but the relation of carrier and passenger establishes it. In the case of *Ball v. Mabry*, 91 Ga. 782, 18 N. E. 64, this court ruled that the degree of diligence due from a common carrier to a passenger is extraordinary, no matter what means of conveyance may be employed, and that this standard of diligence applies as well where the passenger is carried upon a freight train as it does where he is carried upon a passenger train; and, further, that a passenger who voluntarily takes passage on a freight train takes the risk of the usual and necessary jolts and jars which happen in the making up and running of such train; but, when a carrier takes a passenger on a freight train, he must use extraordinary

Note

care in preventing unusual and unnecessary jolts and jars, so as to protect the passenger, just as he is required to do to prevent any jolt or jar on a passenger train which would be likely to injure the passenger. This being true, if the carrier could not waive his negligence in the one case, where the passenger is received on a regular passenger train, he could not in the other case, where the passenger is received on a freight train. We have given to the principles of law involved in this case careful consideration, and, in our opinion, they were properly stated by the trial judge in his instructions to the jury, and, as there was evidence sufficient to sustain the verdict which they rendered, the court did not err in overruling the motion for a new trial. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

NOTE.

Carriers of Passengers—Limitation of Liability for Negligence.—In *New York C. R. Co. v. Lockwood*, 17 Wall. 357, where a recovery was maintained by a drover injured while traveling on a stock train on a pass which provided that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train, it was held that it is not lawful for a common carrier of passengers to stipulate for exemption from responsibility for the negligence of himself or his servants. This case has been frequently followed, and it may be regarded as establishing a settled rule of policy. *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331; *Delaware, etc., R. Co. v. Ashley*, 67 Fed. Rep. 209; *Jones v. St. Louis S. W. R. Co.*, 125 Mo. 666; *Doyle v. Fitchburg R. Co.*, 166 Mass. 492, 5 Am. & Eng. R. Cas., N. S., 257; *Abrams v. Milwaukee, etc., R. Co.*, 87 Wis. 485; *Illinois C. R. Co. v. Beebe (Ill.)*, 11 Am. & Eng. R. Cas., N. S., 163; *Tibby v. Missouri Pac. R. Co.*, 82 Mo. 292; *Missouri Pac. R. Co. v. Ivy*, 71 Tex. 409, 10 Am. St. Rep. 758; *Gulf, etc., R. Co. v. McGown*, 65 Tex. 640, 26 Am. & Eng. R. Cas. 274; *Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; *Piedmont Mfg. Co. v. Columbia, etc., R. Co.*, 19 S. Car. 353.

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CENTRAL OF GEORGIA RY. CO.

v.

JOSEPH.

(*Supreme Court of Alabama, April 19, 1900.*)

Appeal—Review.—Defendant's failure to reserve an exception to the rulings of the court, and to present the motion to strike and the rulings thereon, with the exception to the action with respect thereto, by bill of exceptions, was fatal to his right to have the rulings of the court overruling them reviewed.

Pleading—Demurrers.—The assignment of demurrer to the complaint as amended, "because there is a misjoinder of causes of action," was properly overruled because of its generality.

Witnesses—Interpreters.—The objection to the competency of the interpreter through whom the examination of plaintiff as a witness was conducted was without merit.

Carriers of Passengers—Character of Baggage—Knowledge of Ticket Agent Not Acquired Officially.*—In an action against a railroad for failure to deliver a valise and its contents, plaintiff claimed that defendant accepted the valise for carriage with knowledge that it contained merchandise, and not personal baggage; and contended that the fact that shortly before the purchase of her ticket she opened the valise in the sitting room of the depot, and took from it two pair of sleeveholders, which she sold to the defendant's agent, from whom she afterwards purchased the ticket, and who checked the valise, showed such knowledge. *Held*, that the rule that the master is not bound by the knowledge of his employee acquired by the latter outside of the line of his duty was applicable.

APPEAL by defendant from Montgomery county circuit court. *Reversed.*

Thos. G. & Chas. P. Jones, for appellant.

John W. A. Sanford, Jr., for appellee.

*See generally, *Bader v. Southern Pac. Co.* (La.), 17 Am. & Eng. R. Cas., N. S., 60; *Goldberg v. Ahnapee, etc., Ry. Co.* (Wis.), 17 *Id.* 65; *Trimble v. N. Y. Cent., etc., R. Co.* (N. Y.), 17 *Id.* 176; *Lessard v. Boston, etc., R. Co.* (N. H.), 17 *Id.* 211.

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TYSON, J. This action was commenced in a justice court upon a complaint in which the plaintiff claimed the sum of \$100 of the defendant for "failing to deliver one valise and contents, which was delivered to said defendant corporation on March 12, 1898, and was checked to Opelika." After the case was appealed to the circuit court, the plaintiff amended her complaint by adding another count. The judgment entry recites that the defendant objected to the filing of the amendment, and the "court overruled said objection." No exception appears to have been reversed to this ruling of the court. The judgment entry also recites: "Thereupon defendant, by counsel, moves the court to strike the amended complaint, which said motion to strike be, and is hereby, overruled by the court." No exception was reserved by the defendant to this ruling. The record sets forth, as a part of the proceedings had in the cause, what purports to have been the objections of the defendant to the filing of the amendment, and also the motion to strike the proposed amendment from the file; but neither the objections, nor the motion and the rulings of the court thereon, appear in the bill of exceptions. The failure to reserve an exception to the rulings of the court, and to present the objections or motion to strike and the rulings thereon, with the exception to the action of the court with respect thereto, by bill of exceptions, is fatal to the right of the appellant to have the rulings of the court overruling them reviewed. *Holley v. Coffee* (Ala.), 26 South. 239; *Cottingham v. Grocery Co.*, *Id.* 514.

Appeal—Review.

The assignment of demurrer to the complaint as amended, "because there is a misjoinder of causes of action," was properly overruled because of its generality. Code, § 3303; *Cook v. Brick Co.*, 98 Ala. 409, 12 South 918; 3 Brick. Dig. p. 705, §§ 65-84.

Pleading—
Demurrers.

The plaintiff was an Armenian, and understood their language, but could not speak or understand the English language. Upon this being made known to the court, an

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Armenian, who could speak and understood both the language of the Armenians and the English language, was sworn as an interpreter, through whom, as such, the examination of the plaintiff as a witness was conducted. The record shows that this interpreter sufficiently understood the two languages to translate the questions propounded to the witness in English into the Armenian language, so as to enable the witness to understand them, and to translate the witness' replies into English, so that the court and jury understood them. During the examination of the witness, and after it had progressed at some length, it was made to appear that the interpreter could not read the writing on a slip of paper shown him, on which was written, in English, a list of the articles contained in the valise. Thereupon the defendant objected to his competency on this ground. The list, not having been made by the witness (plaintiff), was not competent to be introduced in evidence. Furthermore, the writing on it being in English, it needed no interpretation for it to be understood by the court and jury trying the cause. Had the list been written in the Armenian language, and been competent evidence in the case, and the interpreter had been called upon to translate it into English, and had been unable to do so, then perhaps the question of his competency as such might have arisen; but when it was shown that he was qualified to perform the office of interpreter of translating the two languages, so as to make the questions asked the witness intelligible to her, and her responses intelligible to the court, we are unable to discover any objection to his being allowed to do so.

Witnesses—
Interpreters.

The cause was tried upon the complaint as amended, pleas 1, 2, and 3 filed by the defendant, and special replication filed by the plaintiff to the defendant's special plea No. 2. As the pivotal point in this case is involved in the issue presented by plea 2 and the special replication thereto, we will only advert to the issue made under them. Plea 2 avers that the articles carried in the valise, for the loss of which this

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sengers—Char-
acter of Baggage
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suit is brought, were not the personal baggage of the plaintiff, but consisted of articles of merchandise carried by her for sale to the public. The special replication alleges that the defendant accepted said valise with a knowledge of the character of its contents, and gave plaintiff a check therefor. The evidence is without dispute that the plaintiff purchased a ticket from the defendant's agent at Seale to Opelika; that her valise was checked by the agent to Opelika after she bought the ticket, and put upon the train that carried the plaintiff to that point. It is also an undisputed fact that the valise contained only articles of merchandise carried by the plaintiff for sale, and no wearing apparel. The facts upon which the plaintiff relies to show knowledge on the part of the defendant of the character of the contents of the valise, as testified to by her, are these: That shortly before the purchase of the ticket she opened the valise in the sitting room of the station house, and took from it two pair of sleeveholders, which she sold to the defendant's agent, from whom she afterwards purchased the ticket, and who checked the valise; that when she opened the valise, and took the sleeveholders out of it, the agent was present, and saw what it contained; that when she got ready to buy the ticket the agent went to the ticket office, and sold her the ticket. The agent was examined as a witness, and denies any knowledge of the contents of the valise, or that he saw what it contained. But this is immaterial under our view of the law. It will be observed that it is not pretended that the agent was transacting any business for the defendant at the time he purchased the sleeveholders. This court judicially knows that he was not. *Gilliam v. Railroad Co.*, 70 Ala. 268. A corporation, like an individual, may be bound by knowledge or information given its agents; but this must be limited to such knowledge or information as comes to the agent in transacting the business of his principal, and is not to be extended to information or knowledge acquired by the agent, which he receives outside of the line of his duty, or while engaged in the transaction of his purely personal affairs. This prin-

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ciple is too thoroughly established, and has been too long settled as a rule of law, by the decisions of this court, to now admit of controversy. *Frenkel v. Hudson*, 82 Ala. 158, 2 South. 758; *Goodbar v. Daniel*, 88 Ala. 583, 7 South. 254; *Reid v. Bank*, 70 Ala. 199; *Wheelan v. McCreary*, 64 Ala. 319; *New York & A. Contracting Co. v. Selma Sav. Bank*, 51 Ala. 305; *Hinton v. Insurance Co.*, 63 Ala. 488; *Terrell v. Bank*, 12 Ala. 502.

The affirmative charge requested by the defendant should have been given. The refusal of other charges requested by the defendant is also assigned as error, but it is unnecessary to consider them. Reversed and remanded.

COMMONWEALTH

v.

LOUISVILLE & N. R. Co.

(*Court of Appeals of Kentucky, Oct. 2, 1900.*)

Highway Crossings—Duty to Construct and Maintain Where Highway Is Laid Out over Railroad.*—Where a statute requires railroad companies constructing their roads across highways to construct and maintain suitable crossings at such points, an indictment charging a railroad with being guilty of a public nuisance in permitting the approaches and grade of its road within its right of way, at a point where it crosses a public highway, to remain for an unreasonable length of time in such a condition as to be inconvenient and dangerous for vehicles, is not defective because it contains no averment that the highway was constructed before the railroad was built; as the railroad's duty under such statutory requirement is the same whether the highway was laid out before or after the construction of the railroad.

APPEAL by commonwealth from Boyle county circuit court. *Reversed.*

*See notes at end of case.

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Clifton J. Pratt and R. J. Breckinridge, for the Commonwealth.

R. P. Jacobs, C. R. McDowell, and E. W. Hines, for appellee.

WHITE, J. The appellee was indicted in the circuit court of Boyle county for the offense of suffering and permitting a public nuisance. A demurrer to the indictment was sustained, and the commonwealth appeals.

The accusing part of the indictment, after charging the existence of the corporation, proceeds: "Did unlawfully suffer and permit a public nuisance at a point where its road crosses a certain highway, namely, where its road crosses the county road leading from Parksville to Junction City, Boyle county, Ky., the same being the second crossing of said railroad over said county road south of Parksville, by unlawfully suffering and permitting the approaches and grade of said road on either side of the railroad track within said railroad company's right of way to become and remain for an unreasonable length of time, to wit, thirty days, very steep and narrow at the point aforesaid, so as to be inconvenient and dangerous of ascent and descent for wagons and other vehicles, to the common nuisance of all good citizens passing and repassing along and over said highway and county road, against the peace and dignity," etc. The objection urged to the indictment by counsel for appellee is that there is no averment that the public highway was constructed before the railroad was built; that, in construing the indictment most strongly in favor of the accused, the necessary deduction is that the highway was built after the railroad, and counsel therefore contends that there was no duty resting on appellee to maintain and repair the approaches on either side of the railroad track; and, this being true, there could be no conviction. In the case of Paducah & E. R. Co. v. Com., 80 Ky. 147, this court said: "Where a railroad company lays its track across a public highway, reason and necessity unite in demanding that the company should have

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paramount control over the full extent of its right of way, and the right to make and regulate the repairs necessary to the use of crossings by the public, and, as a consequence of this authority, become responsible to the public and individuals for injuries resulting from a failure to repair, or from unskillful repairs of such crossings; for as overseers of highways traversing railroads are either admitted or required to enter the space covered by the company's right of way, uncontrolled by it, for the purpose of repairing the crossings or approaches to them, disastrous consequences might result to the company from the negligence or unskillfulness of overseers, without the power or privilege to avoid them. For these reasons we think it was the company's duty to keep the crossing and its immediate approaches in such repair as would enable the public to use it with reasonable security and convenience." While the facts do not appear in the opinion, from the context we are led to believe the highway referred to was in existence when the railroad was built. However, the reasoning of the opinion is just as strong if the road had been established after the railroad. The fact that the railroad was built across an existing highway would not make the necessity greater that the railroad should have paramount control over its right of way than if the highway was established across a railroad already in operation. The opinion is authority to hold that the railroad company should keep and maintain highways in repair, to the extent of the company's right of way, whether existing at the time or constructed after the railroad was built. In the case of *Railroad Co. v. Smith*, 13 Am. & Eng. R. Cas. 608, the supreme court of Indiana said: "In section 3903, Rev. St. 1881, in force since May 6, 1853, it is provided as follows in relation to railroad companies: 'Every such corporation shall possess the general powers, and be subject to the liabilities and restrictions expressed in the special powers following: * * * Fifth, to construct its road upon or across any stream of water, water-course, road, highway,

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railroad or canal, so as not to interfere with the free use of the same, which the route of its railroad shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or water-course, road or highway, thus intersected, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises.' The appellant's counsel claim, however, that these statutory provisions are not applicable to the case at hand, because, they say, 'the complaint does not show, nor in point of fact is it pretended, that the highway has not grown into use since the railroad was built.' In other words, it is claimed by counsel, as we understand them, that the clause of the statute quoted is applicable only to the original construction of appellant's railroad across highways then in existence, and does not apply to a case where it may be assumed, for want of averment to the contrary, that the highway was laid out and opened across the railroad after its construction. We do not think that the clause of the section quoted should receive from the courts any such literal or limited construction in the interest either of the public or of the railroad company. Whether the highway is laid out and opened before or after the construction of the railroad, the legislative intent in the clause quoted is clear, we think, that the railroad company shall construct its road at its intersection with such highway 'in such manner as to afford security for life and property.' This construction of the statute will subserve the interest of the railroad company, as it seems to us, in the preservation of its trains from possible destruction, and in the safety of its employees and passengers." We have quoted that opinion and the statute therein cited to show the close analogy to ours, which reads (section 768): "Every company shall possess the following powers and be subject to the following liabilities and restrictions: * * * 5.— To construct its road upon or across any water-course, private or plank road, highway, street, lane, or alley and across any railroad or canal; but the corporation shall restore the

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water-course, etc., private or plank road, highway, street, lane, alley, railroad or canal to its former condition, as near as may be, and shall not obstruct the navigation of any stream, or obstruct any public highway or street, by cars or trains, for more than five minutes at any one time; and shall construct suitable road and street-crossings for the passage of teams by putting down planks or other suitable material between and on each side of the rails, the top of which shall be at least as high as the top of the rails of such road or street," etc. We are aware that the superior court in the case of Paducah & E. R. Co. v. Com., 4 Ky. Law Rep. 625, decided that a different rule applied to crossings of highways, depending on the time of their establishment. That court said that, if established before the railroad, the crossings should be kept up by the company; if after, by the overseer or other public authority. When it is considered that the railroad may establish and change its grade at pleasure without consulting the overseer or other officer in charge of the highway, and also that in a great number of cases the grade is not on a level with the highway, and that in almost all instances highways are established on the surface level without cut or fill, the reason of the rule laid down in 80 Ky. 147, is apparent and pertinent whether applied to an elder or more recently established highway. We are clearly of the opinion that the opinion of the superior court, *supra*, is incorrect in principle, and will not be followed. We hold that it is the duty of a railroad company to maintain in reasonable order and condition all highways crossing the tracks of the railroad, to the full width of the right of way, regardless of any question as to the time of their establishment. It follows that, in our opinion, the indictment herein is sufficient, and that the demurrer thereto should have been overruled. Judgment reversed, and cause remanded, with directions to overrule the demurrer, and for proceedings consistent herewith.

PAYNTER, J., dissenting.

Notes

Duty of Railroad to Construct and Maintain Crossing over Highway Subsequently Laid Out.—Under the Nebraska act of March 31, 1887, requiring railroad corporations to construct and keep in repair suitable crossings where railroads cross public highways it is the duty of a railroad company to make and keep in repair suitable crossings, with approaches, notwithstanding the highway was laid out after the railroad was built. *State v. Chicago, B. & Q. R. Co.* (Neb.), 42 Am. & Eng. R. Cas. 248. See also *Scanlan v. Boston*, 140 Mass. 84.

Contra.—Where new roads are laid out across a railroad track the railroad company is not bound to keep such crossings in repair unless specifically required by the statute so to do. *Northern Central R. R. Co. v. Baltimore*, 46 Md. 425.

And in *Rock Creek Township v. St. Joseph & G. I. R. Co.* (Kan.), 42 Am. & Eng. R. Cas. 256, it was said in delivering the opinion, "While it is clearly the duty of a railroad company (under section 43, chap. 84, Kan. Comp. Laws, 1885) to restore the highway crossings whenever its road crosses over highways to a safe condition, and to keep them so, and to make the approaches thereto, yet such is not its duty in reference to the crossings of public highways over railroads where the public highways were laid out and opened subsequent to the construction of the railroad. 1 Ror. R. R. 554. In this case, the evidence shows that the railroad was built some 15 years before the highway was established, and about six years before the passage of the law under which this suit was brought. We do not see how it can be successfully maintained that this law could have any operation upon a railroad located long before the passage of the act, and years before the establishment of the road; and we are of the opinion that there is no liability under this law, when a highway is located over an existing railroad, for the obstruction of the highway by the railroad, if the company complied with all the laws in force when the road was constructed."

So, in *Sutton v. Chicago, etc., Ry. Co.* (Wis.), 10 Am. & Eng. R. Cas., N. S., 102, it was said, in delivering the opinion, that "the statute (Rev. St. § 1836) requires every railway company constructing its road across or upon any highway to restore such highway to its former state, or to such condition that its usefulness shall not be materially impaired. It has been held by this court that this provision applies only to cases where the railroad is built upon or across an already existing highway. *Chicago, M. & St. P. Ry. Co. v. City of Milwaukee* (present term), 9 Am. & Eng. R. Cas., N. S., 537, 72 N. W. 1118."

Mobile & O. R. Co. v. Donovan

MOBILE & O. R. Co.

v.

DONOVAN.

(*Supreme Court of Tennessee, April 25, 1900.*)

Res Judicata.—A decree in a former suit to which both plaintiff and defendant were parties, by which it was established that the railroad was only entitled to 50 feet on the west side of the center of its track, was conclusive of such question, no appeal having been prosecuted, and the same standing unreversed.

Right of Way—Fee in Grantor—Adverse Possession.*—Where land is conveyed to a railroad for its right of way, to be used for railroad purposes only, the proprietor of the soil still retains the fee of the land for any purpose not incompatible with the purposes of the railroad company; and, therefore, his possession of the land for agricultural purposes is not adverse to the company's right so long as the land is not required for railroad purposes.

APPEAL, by defendant from Gibson county chancery court.
Affirmed.

Deason & Rankin, for appellant.

Wm. M. McCall and *C. G. Bond*, for appellee.

McALISTER, J. This bill was filed by complainant company to enjoin the defendant from encroaching upon the railroad's right of way. The bill alleged that defendant, Donovan, was in the act of fencing up the right of way to a point within 15 or 20 feet of the center of the track, and extending a distance of 650 feet parallel with the track. Complainant claims this right of way—First, under the authority of its charter, granted by the legislature of this state on the 28th of January, 1848; second, by virtue of a decree of the chancery court at Humboldt passed on the 8th of January, 1874, in the case of the Memphis &

Case Stated.

*See note at end of case.

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Ohio Railroad Company (which is now the Louisville & Nashville Railroad Company) against J. N. Lannom *et al.*, wherein it was decreed that the Mobile & Ohio Railroad Company was entitled to a right of way 50 feet in width on the west side of its track for a distance of 650 feet. The defendant answered the bill, in which he asserted title to the strip of land in controversy—First, by the statute of limitations; and, second, by virtue of the decree pronounced in the cause already mentioned, his predecessors in title, as well as the Mobile & Ohio Railroad Company, being parties to this suit. Defendant admitted that he was about to fence the strip of land as alleged in the bill, but claimed that complainant company had no interest in the property, and justified his action under the titles already mentioned.

A large volume of testimony was taken in the cause, and at the January term, 1900, of the chancery court at Humboldt, the chancellor decreed substantially as follows, *viz.*: "The court is of opinion that the rights of the Mobile & Ohio Railroad Company in and to said strip of land are acquired and held under and by virtue of said deed referred to and the decree above set out, setting up said deed, and it is so adjudged and decreed; and the court is further of opinion that all the rights, claims, and interests of the defendant, Dan Donovan, in and to said strip of land, are likewise acquired and had under and by virtue of said deed and said decree and his title papers, which are limited by the same, and the same is so decreed. Now, touching the rights of the Mobile & Ohio Railroad Company and the defendant, Dan Donovan, and his successors in title to said hotel property, in and to said strip of land, under said deed, as set up in said decree, and under said decree, the terms of which are binding upon both, the court is of the opinion that in the description of the west boundary line of said strip of land, wherein the description is in these words, 'Then southerly to the Memphis and Ohio R. R.,' that these words mean parallel with said Mobile and Ohio Railroad, and 50 feet distant from the center line of the same on the west, but to so run as not to

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interfere with the said hotel buildings, not only along the line of the Memphis & Ohio Railroad, but along the Mobile & Ohio Railroad as well; and that is to say that under said deed, as set up in said decree, and under and by terms of said deed and decree, the Mobile & Ohio Railroad Company is given and has an easement in said strip of land, for the full width of fifty feet, for railroad purposes, and freely and fully to use the same for all reasonable railroad purposes, but that said easement and said use are subservient to the like right of the owners of said hotel property, to the full, free, and uninterrupted use of the same for free and uninterrupted egress, ingress, and regress to and from the said hotel, and not to be interrupted in the same by the Mobile & Ohio Railroad Company, and the same is so adjudged and decreed." The chancellor also held that the holding of neither party had been adverse, and that neither party had thereby acquired the dominant estate. From this decree the defendant prayed and perfected a special appeal, assigning 16 different grounds. The complainant also filed the record for writ of error.

It is assigned as error by complainant that the chancellor decreed that the Mobile & Ohio Railroad Company acquired no title to said property by virtue of its charter, and that its charter rights were abandoned under the Osburn deed, and the decree of 1874 in the Lannom Case. The facts on this branch of the case are that in August, 1857, one John Osburn was the owner of the tract of land which comprises the four angles at the intersection of the Mobile & Ohio Railroad Company and the Louisville & Nashville Railroad Company at Humboldt. At the date last mentioned the Mobile & Ohio Railroad Company, under the provisions of its charter, and with the consent of John Osburn, the owner of the land, proceeded to lay off a right of way 100 feet in width at the point where the crossing of the two roads is now located. About this date John Osburn began the erection of a hotel in the corner of the northwest angle, near the right of way of the Mobile & Ohio Railroad Company. Contemporaneously

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with these constructions the Memphis & Ohio Railroad also proposed to build a line which crossed the Mobile & Ohio Railroad at this point. John Osburn, the owner of the land, executed a deed to the Mobile & Ohio Railroad Company, conveying certain land lying in the four angles contiguous to the crossing. It appears that this deed was lost and never recorded. However, both railroads and the hotel building were all completed prior to the Civil War. In 1859 Osburn executed a deed of trust on the hotel property to one Taliaferro, and in 1860 he made a second deed of trust on this property to one Black. These deeds of trust were foreclosed shortly after the war, and at the chancery sale the hotel property was purchased by Roe & Barnes at the price of \$24,100. In 1870 Roe & Barnes sold the hotel property to R. E. Dunlap, who assumed the payment of the balance of the purchase money. Dunlap failed to pay the debt due by Roe & Barnes, and the property was again exposed to public sale, when it was purchased by Sparrel Hill. In 1885 Hill sold the property to Peeples, and in April, 1887, Peeples sold to the present defendant, Dan Donovan.

Turning back to 1870, we find that the Memphis & Ohio Railroad Company filed a bill against Roe & Barnes and the heirs of John Osburn, deceased, for the purpose of establishing the lost deed executed by John Osburn in his lifetime, and charging that the deed conveyed to the railroad all the land embraced in the four angles made by the intersection of the two roads, and comprising about 13 acres; reserving, however, sufficient ground for a hotel. Roe & Barnes answered the bill, denying that the deed conveyed all the angles, and alleging that the whole northwest angle was expressly reserved. The Mobile & Ohio Railroad Company filed a petition in that case, asking to be made a party, and that its rights be adjudged. It alleged that under its charter it had a right of way 100 feet wide on each side of its road; that the hotel then constructed was only 40 feet from its center line, and was impinging on its property. It also claimed that Osburn deeded all four of the angles to the two railroads. In

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1871 Dunlap, who then owned the hotel property, filed a cross bill in said cause against the Mobile & Ohio Railroad Company and others, alleging that Osburn only conveyed three angles to the railroad, reserving the northwest angle. The Mobile & Ohio Railroad Company failed to answer this cross bill, and a *pro confesso* was taken against it. No appeal was ever perfected from said decree. It appears that at the time that bill was filed the two railroad companies were in possession of the three angles, and have been in possession ever since, occupying them for various railroad purposes. The court held in that proceeding that John Osburn did execute a deed to the two railroad companies, embracing the three angles contiguous to the crossing, but that the northwest angle was reserved, excepting a strip 50 feet wide from the center of the track on the west side. The boundaries of the lost deed which was set up and established by the decree of 1874 in the Lannom Case are, *viz.*: "A lot or parcel of land situated in the Third civil district of Gibson county, Tennessee, beginning at a point on the center line of the Memphis & Ohio Railroad, 650 feet in a southerly direction from its intersection with the Mobile & Ohio Railroad, running fifty feet in a southerly direction at right angles with said Memphis & Ohio Railroad; thence running, by a regular curve of 476 feet radius, to a stake near the center line of the Mobile & Ohio Railroad, 650 feet southerly from its intersection with the Mobile & Ohio Railroad Company; thence, in a direction at right angles, in an easterly direction, to the Mobile & Ohio Railroad, 100 feet, to a stake, crossing the center line of the Mobile & Ohio Railroad at fifty feet; thence, by a regular curve of 716 feet radius, to a stake near the Memphis & Ohio Railroad, 650 feet northerly from its intersection with the Mobile & Ohio Railroad; thence, in a direction at right angles to said Memphis & Ohio Railroad, 100 feet, to a stake, crossing the center line of said road at fifty feet; thence, by a regular curve of 476 feet radius, to a stake near the Mobile & Ohio Railroad, 650 feet northerly from its intersection with the

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Mobile & Ohio Railroad; thence, in a direction at right angles to said Mobile & Ohio Railroad, 100 feet, to a stake, crossing the center line of said road at 50 feet; then southerly to the Memphis & Ohio Railroad; thence west down said Memphis & Ohio Railroad, so as not to interfere with said hotel building and other buildings along the line of said road, to the beginning,—containing about — acres. And it appears to the court from the testimony in this cause that said lot of three angles of land was * * * conveyed to said Mobile & Ohio Railroad and Memphis & Ohio Railroad jointly, by them to be had and held for any and all railroad purposes, such as roadbeds, switches, Y tracks, depot grounds, without let or hindrance or molestation, and to be freely and fully used by said railroad company." The court then adjudged and decreed that said railroad companies are hereby invested with the title to said three angles of land above described, by them fully to be used and employed for all railroad purposes, and no other, such as roadbeds, switches, Y tracks, and depot buildings, without let or hindrance on the part of any one, but neither of said railroads shall erect a hotel, eating house, or saloon on said angles. It was further decreed that said railroad companies are to have the privilege of constructing and using suitable platforms around said angle, connecting with said hotel, etc.

Now, it will be perceived that the complainant company is seeking to make the same question in this case which it made in 1874 in the Lannom Case, and which was adjudicated against it, namely, that under its charter it was entitled to 100 feet on each side of its road. But it was determined in that case that the company was only entitled to 50 feet on the west side of the center of its track. This decree is, of course, conclusive of the question now sought to be made; no appeal having been prosecuted, and the same standing unreversed. We agree with the chancellor in his holding that the rights of the Mobile & Ohio Railroad Company in said strip of land are acquired and held under and by virtue of the Osburn deed, and the

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decree of 1874 setting up that deed; that whatever its charter rights and its right of way, under its charter, may have been in and to the same prior to its acceptance of the benefits under the Osburn deed, by its acceptance of the benefits of said deed, and going into the possession of the lands conveyed in the other three angles, and using, occupying, enjoying, and claiming the same, it thereby intended to give up and abandon any and all rights and claims that it had in said strip of land in the northwest angle, under and by virtue of its charter and right of way, of any width whatever in the same; that said Mobile & Ohio Railroad, by the acceptance of the benefits of said deed and decree, and by its acts and doings in the premises, is estopped from setting up any claim or title to said strip of land under and by virtue of any right of way or possession under its charter. We also agree with the chancellor that under said deed, and the decree of 1874 establishing it, the Mobile & Ohio Railroad Company is given an easement in said strip of land, the full width of 50 feet, for railroad uses, and no other purposes.

The chancellor, in deciding the present case, held that the west boundary line in the deed and decree of 1874 ran parallel with the Mobile & Ohio Railroad track, and 50 feet from the center line of said track, but so as not to interfere with the hotel building along the side of the Mobile & Ohio Railroad, or on the side of the Memphis & Ohio (Louisville & Nashville) Railroad Company. This last clause raises the principal controversy in the present case, namely, what are the rights of the respective parties in this 50-foot strip? The general rule is "that an easement gives to a railroad company a right of way in the land; that is, the right to use the land for its purposes. This includes the right to employ the land taken for the purpose of constructing, maintaining, and operating a railroad thereon. Under this right the company has the free and perfect use of the surface of the land so far as is necessary for all its purposes, and the right to use as

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much above and below the surface as may be needed. This would include the right to tunnel the land, to cut embankments, to grade and make roadbeds, to operate and maintain a railroad, with one or more lines of track, with proper stations, depots, turnouts, and all other appurtenances of a railroad." The former proprietor of the soil still retains the fee of the land for any purpose not incompatible with the purposes of the railroad company. "The paramount right is with the railroad company, and the landowner can do nothing which will interfere with the safety of its road, appurtenances, trains, passengers, or workmen." *Railway Co. v. Telford's Ex'rs*, 89 Tenn. 293, 298, 299, 14 S. W. 776; *Railroad Co. v. French*, 100 Tenn. 209, 212, 43 S. W. 771; *Railway Co. v. McReynolds* (Tenn. Ch. App.), 48 S. W. 258.

The question then remains whether the defendant, Donovan, and his predecessors in title, by adverse holding have acquired title or an easement in said land. Complainant, in its bill, alleges title by peaceable possession for more than 25 years. The defendant also claims an adverse holding of said land for 25 years. It is conceded by learned counsel for the defendant that the statute of limitations does not begin to run against a railroad company until the land is needed for railroad purposes; that the occupation of the land by the owner of the fee is not inconsistent with the title of the railroad, which has an easement in the same so long as it is not required for railroad purposes. But the insistence of defendant is that the evidence of complainant shows that the company needed this strip of land for railroad purposes, and had needed it for many years, and that the holding of same by defendant had been of such a character as to make the holding adverse. The evidence on this point is that the old hotel erected by Osburn stood until 1872, when it was burned down, and the present brick hotel building constructed. It appears that the old hotel was built with an 8-foot veranda along its east side, forming a part of the hotel, and the old hotel stood about 40 feet from the center line of the right of

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way of the Mobile & Ohio Railroad Company. It further appears that a platform extending from the east edge of the hotel veranda to within 18 feet of the railroad track was originally built for the convenience of the hotel, and that this platform was repaired and kept up by the successive owners of the property. It also appears that the railroad built and maintained a platform along the west side of the track, about 16 or 18 feet in width, and adjoining the platform erected by the hotel owners. This was about the situation of the property until 1893, when the defendant, Donovan, erected the present brick hotel on the site of the old hotel. When this bill was filed, in July, 1893, Donovan was proceeding to build a fence, and was digging holes along the line of the east edge of his hotel platform, which he claimed was the line of the original fence. Donovan claims all of this strip, excepting about 18 feet from the railroad track. In constructing the new hotel it was claimed by the roadmaster of the complainant company that the southeast corner would encroach upon the 50-foot strip about 2 feet. Donovan was notified of this fact, and, after making measurements, moved back his foundation from this strip. Said hotel building at all points was built more than 50 feet from the center line of the Mobile & Ohio Railroad Company; its southeast corner being about 51 feet from said center line, and its northeast corner being about 45 feet from the same. It appears from the proof that the several owners of the hotel planted shade trees on this strip of land. They set out flowers and shrubbery on it. They opened an artificial lake on it. They laid it off in grass plots, and such portion of it as was not needed for ingress, egress, and regress was inclosed by a fence. As already stated, the part of this strip in front of the hotel was covered with a platform which was built and maintained by the proprietors of the hotel for the use and convenience of the guests. But we are unable to concur with counsel that these acts on the part of the several proprietors of the hotel constituted an adverse holding, or were inconsistent with the easement to which the company was

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entitled in this strip of land whenever it might become necessary for railroad purposes. We agree with the chancellor that the holding of the Mobile & Ohio Railroad Company, and the holding of the defendant, Dan Donovan, of said strip of land, or any part thereof, have not been adverse, and that they have not been of such a character as to give either of them a dominant title, excepting so much as is covered and occupied by the roadbed of the Mobile & Ohio Railroad Company. As was said by this court in *Railway Co. v. Telford's Ex'rs*, 89 Tenn. 293, 14 S. W. 776, subject to the easement of the railway company in the lands taken, the fee and right of possession remain with the vendor, and therefore his possession of the land for agricultural purposes is not adverse to the company's right, so long as the land is not required for railroad purposes, and there is no open assertion of any right hostile to or incompatible with the company's easement therein. So, in *Railroad Co. v. French*, 100 Tenn. 209, 43 S. W. 771, it was held, *viz.*, "Possession of lands within the right of way of a railroad company, maintained by the owner of the fee by the erection of buildings thereon, and inclosure and cultivation, is not adverse to the company, and will not, though continued for more than seven years, defeat or affect its easement therein, or its right to occupy and use the premises for any legitimate and necessary railroad purpose."

It is next assigned as error by both complainant and defendant that the chancellor held that the west boundary line as established in the decree of January, 1874, ran parallel with the Mobile & Ohio Railroad track, and 50 feet west from the center of said line of said road, but so as not to interfere with the hotel building fronting on the Mobile & Ohio side, as well as on the Memphis & Ohio side. The complainant insists that the chancellor was correct in holding that the line ran parallel with the Mobile & Ohio Railroad, but he was in error in holding that it must be run so as not to interfere with the hotel and other buildings. The defendant insists that this line was an error in the decree of

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1874; that it should have stopped in the center of the Mobile & Ohio track, and run down it. It is a sufficient answer to the contentions of both parties that this line was established by the decree of 1874, in which cause they were both parties, and they are, of course, bound by it. It was the manifest purpose and intention of the grantors in said deed, as declared by the decree of 1874, that the line should be run so as not to interfere with said hotel and other buildings; the object of the grantor being to render this northwest angle valuable for hotel purposes. It would wholly defeat the expressed intention of the grantors if the west boundary line should be run so as to destroy or impair the value of the hotel property. But it is said on behalf of complainant that the decree of the chancellor leaves the parties in the dark as to their respective rights in this 50-foot strip; that it declares that the Mobile & Ohio Railroad Company has an easement in this strip, but it is not to be used so as to interfere with the rights of the hotel company, and, on the other hand, that the defendant, Donovan, also has a right to this strip, but it shall not be used so as to endanger the running of trains. We think the decree of the chancellor is perfectly clear, and its own language furnishes a complete answer to the assignment of error. It is as follows: "The Mobile & Ohio Railroad Company is given and has an easement in said strip of land, for the full width of 50 feet, for railroad purposes, and freely and fully to use the same for all reasonable railroad purposes, but that said easement and said use are subservient to the like right of the owners of the said hotel property to the full, free, and unimpeded use of the same for free and uninterrupted egress, ingress, and regress to and from the said hotel, and not to be interrupted in the same by the Mobile & Ohio Railroad Company, and the same is so adjudged and decreed. The court is further of the opinion that the Mobile & Ohio Railroad Company has no right to use said strip or parcel of land in any manner that will materially lessen or injure the value of said hotel property, —it being the evident intention and purpose of said deed,

Note

as set up in said decree, to render the northwest angle, in which said hotel is and was located, valuable for hotel purposes; and the same is so adjudged and decreed. The court is further of the opinion that the owners of said hotel property, in the use of said strip of land as hereinbefore decreed, have the right to erect proper fences in said plot of ground, and to inclose grass plots and flower plots, and beautify the same, provided such fences are not of such a character and so located as to interfere with the railroad company in the use of the same for proper railroad purposes, and do not approach so near to the railroad as to endanger the running of trains or interfere with the running of the same; and the court is of further opinion that the owners of the hotel property have the right to plant out and grow proper shade trees on said strip of land, but not to endanger the running of trains, and that such use would be a proper use for hotel purposes, and the same is so adjudged and decreed." We think the difficulties suggested by counsel in the interpretation of this decree are unsubstantial. It is not shown that the railroad company is demanding this right of way for any reasonable railroad purpose, or that it is needed at this time. It is not shown that the shade trees planted out by the owners of the hotel, or the fence inclosing the grass plot, are at all harmful to the railroad or dangerous in its operation. When such an emergency arises, the company will have its remedy. We cannot anticipate such trouble, or determine in advance what particular use may be made by the railroad of this strip of land, further than is defined by the deed and the decree of 1874. The decree of the chancellor is affirmed.

NOTE.

Right of Way—Railroad's Right of Possession Exclusive—Adverse Possession.—A conveyance of a strip of land on each side of a railway, for the expressed purpose of constructing, maintaining, and operating thereon a single or double track railroad, with all its necessary appurtenances, etc., to have and to hold the same to the com-

Note

pany, its successors and assigns forever, "for all lawful uses and purposes incident to a full and indefeasible title in fee simple," etc., while it may not pass an estate in fee, yet so far as the right of possession for railroad purposes is concerned, the estate conveyed has most of the qualities of a fee. Under such a deed the right of possession conveyed is exclusive, and wholly inconsistent with the subsequent possession of the land, or any part of it, by the grantor, for the purpose of grazing or agriculture, which, if continued by the latter for twenty years will vest in him a title by adverse possession. *Illinois C. R. Co. v. Houghton*, 126 Ill. 233, 18 N. E. Rep. 301, 1 L. R. A. 213, 21 Ohio L. J. 310.

In this case *BAILEY, J.*, in delivering the opinion of the court said: "But it is insisted that the plaintiff's right of way being a mere easement, the fee remaining in Walker and his grantees subject to the easement, the possession of Walker and his grantees is to be regarded as being held under their title, and therefore not hostile to the plaintiff so as to constitute it an adverse possession. To this view we are unable to yield our assent. If the right of way of a railroad company were an easement, the proper enjoyment of which was consistent with the possession and occupancy of the land by the owner of the fee, such possession and occupancy might be regarded as a mere exercise by the owner of the servient estate of his property-rights, subject and in subordination to the easement. Such, however, is not the character of the easement which a railroad company acquires in the land covered by its right of way. As said in *Hazen v. Boston & M. R. Co.*, 2 Gray 574: 'The right acquired by the corporation, though technically an easement, yet requires for its enjoyment a use of the land, permanent in its nature and practically exclusive.' The same view was taken by the Supreme Court of Vermont in *Hurd v. Rutland & B. R. Co.*, 25 Vt. 116, where, in discussing the interest obtained by a railroad company in its right of way by condemnation, the court says: 'If that interest is regarded as a mere servitude or easement, the land nevertheless becomes so far the property of the corporation that their right is exclusive in its use and possession during its existence, as much so as that of the owner or occupant of the adjoining land. Those from whom the land was taken retain no right to its use or occupation for pasturage or otherwise. The object for which it is appropriated and used is wholly inconsistent with such right on the part of the former owner, as well as with that security to themselves and safety to the public which is necessary to enable the corporation to enjoy the franchises granted by their charter.'

In *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150, the same court, speaking through Mr. CHIEF JUSTICE REDFIELD, says: 'The railway company must, from the very nature of their operations, in order to the

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security of their passengers, workmen, and the enjoyment of the road, have the right at all times to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy by the former owners in any mode and for any purpose.' [See also *Troy & B. R. Co. v. Potter*, 42 Vt. 265; *Kansas C. R. Co. v. Allen*, 22 Kan. 285.

In *Illinois C. R. Co. v. Godfrey*, 71 Ill. 500, this court held that the right of way was the exclusive property of the railroad company, upon which no unauthorized person had a right to be for any purpose; and in the opinion of this court in *Chicago & M. R. Co. v. Patchin*, 16 Ill. 198, it is said: 'I presume the right to the land upon which railroads are built is not strictly analogous to the easement of the public in highways, leaving the fee in the owner of the soil, but is an absolute ownership in fee for railroad purposes.'

While we are not disposed to hold that the deed from Walker to the plaintiff conveyed to the plaintiff an estate in fee in the right of way, it is clear that in conveying an estate which, so far as the right of possession for railroad purposes is concerned, had most of the qualities of the fee; the right of possession thereby conveyed was exclusive, and was wholly inconsistent with the subsequent possession of the land, or any part of it, by the grantor or his assigns, for purposes of grazing or agriculture, or as a part of the farm to which it originally belonged.

The possession of Walker and his assigns being wholly inconsistent with the plaintiff's title, and having been held under a claim of title on their part, has been hostile, and has constituted an adverse possession, and, such possession having been continued for more than twenty years, the plaintiff's right to bring its action for the recovery of said lands is barred by the statute."

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v.

NORTHERN PAC. RY. CO.

(Supreme Court of Minnesota, July 19, 1900.)

Injury to Child on Track—Failure to Fence.*—In a personal injury case brought by plaintiff to recover for damages received by his son, aged 5 years, while upon defendant's tracks, it is held that the trial court erred when refusing to charge the jury, as requested by plain-

*See notes at end of case.

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tiff's counsel, that it was the legal and absolute duty of defendant railway company to fence its tracks at the point where the boy first walked upon the tracks and at the point—a short distance away—where he was injured, and also when it refused to charge that the failure to fence at these points was, in law, evidence of negligence.

Same—Same—Railroad Yards.—The mere fact that these points were within the yard limits of defendant company did not relieve it of the statutory duty to fence its tracks.

Statutes.—Laws 1897, c. 346, has not affected that part of Gen. St. 1894, § 2695, construed in *Rosse v. Railway Co.*, 71 N. W. 20, 68 Minn. 216, 37 L. R. A. 591, whereby *Fitzgerald v. Railway Co.*, 13 N. W. 168, 29 Minn. 336, was overruled on one point.

(Syllabus by the Court.)

APPEAL by plaintiff from St. Louis county district court.
Reversed.

John Jenswold, Jr., for appellant.

C. W. Bunn and *J. L. Washburn*, for respondent.

COLLINS, J. This is a personal injury case brought by the plaintiff to recover for damages received by his minor son, aged 5 years, while upon the defendant's tracks, to which he had gone shortly after leaving the plaintiff's residence, about two or three blocks away. The place of the accident was within the city limits of Duluth, and some two or three hundred feet north of the north end of the Interstate Bridge between West Superior, Wis., and Duluth, Minn., across the Bay St. Louis. Commencing near the bridge, and running northerly, are defendant's double tracks; one being used for outgoing trains, and one for incoming. South of the point of the accident several roads unite, using the same bridge across the bay. The double tracks extend northerly some 1,500 feet to the switching or freight yards of the defendant company. It is about 2 miles from the scene of the accident to the Duluth Union Depot. In the vicinity of the bridge and northerly there are many houses, evidently of a very poor character, occupied largely by laboring people. For some distance north of the bridge, and at the point of the accident, the tracks are on an embank-

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ment 15 feet high at the highest point. The tracks reach the surface before coming to the switch or freight yard. The defendant's yard extends, in name, to the bridge; but it is quite evident that the handling of freight cars for switching purposes is all done several hundred feet away, in and near to the freight yard, and that if any switching is done south thereof, or within several hundred feet of the place of the accident, it is merely incidental.

There are a large number of assignments of error, but, as we look at the case, we are required to consider but two. The defendant's tracks are not fenced north of the bridge.

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Track—Failure to
Fence. The court was requested by the plaintiff's counsel to charge the jury that it was the legal and absolute duty of the defendant to fence its tracks at the point where the boy first walked upon the tracks, and at the point, a short distance away, where he was injured; and the court was also requested to charge that the defendant's failure to fence the tracks at these points was, in law, evidence of negligence. The court refused to give either of these requests, but left the question of negligence for the determination of the jury upon all of the facts. We think this was error. The evidence in respect to the necessity and practicability of fencing was that given by the defendant's superintendent, who said that the only reason why the defendant did not fence at this particular place was that the track crossed a good many streets, which would have to be left open, so that the fence could only be between them, and therefore that a great number of cattle guards would be required, which would be dangerous for employees while engaged in switching. The statutory duty of the defendant company to fence its tracks is imperative, and no part thereof is excluded in terms. Gen. St. 1894, §§ 2692-2695; *Hurt v. Railway Co.*, 39 Minn. 485, 40 N. W. 613. This duty applies as well within the limits of an incorporated city as without. *Greeley v. Railway Co.*, 33 Minn. 136, 22 N. W. 179. There is an exception, by implication, to this statutory rule, where public necessity or convenience requires it, such as station

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grounds; but the burden of showing that it is not bound to fence its tracks, where unfenced, rested upon the company. *Cox v. Railway Co.*, 41 Minn. 101, 42 N. W. 924. This implied exception has been held as to such places as depot and station grounds used for the convenience of passengers and the necessary handling of freight. This is as far as this court has gone, although there may be other and further exceptions,—such, for instance, as a yard used for switching purposes, crossed at surface by ~~Same—Same—~~ Railroad Yards. streets. Fencing without cattle guards on either side of the street crossings would be of no value at such places, and guards would prove death traps to switchmen, who, in such yards, have to do a large part of their work on the ground. But on this record we are not required to consider or decide what the statutory duty of defendant company may be in respect to fencing its switch or freight yard some 1,500 feet away from the scene of the accident, in which yard it has a large number of tracks actually and constantly used for switching or transfer purposes. We are now considering its duty at the point where the boy went upon the tracks and where he was injured,—places where for at least three or four hundred feet there were no surface crossings of streets, the tracks being on an embankment, which rendered such crossings impracticable. In fact the crossing at Oak street, the place where the boy went upon the tracks, was under the latter. No reason whatever existed for omitting to fence at this place, and, so far as we can discover, for several hundred feet northerly. The place was not within any exception which can be read into the statute, and it was error to refuse the requests to charge we have referred to.

Sections 2692–2694 were originally sections 1–3, Laws 1876, c. 24. Another section of the chapter just mentioned (section 4) was amended (Laws 1877, c. 73) so that all companies failing or neglecting to fence were made liable for all damages sustained by any person in consequence of such failure or neglect. By another act

Statutes.

Notes

(Laws 1877, c. 107) it was provided that a legal fence could be made of four smooth wires, the lower one to be not less than 16 nor more than 20 inches from the ground. It was then held (*Fitzgerald v. Railway Co.*, 29 Minn. 336, 13 N. W. 168) that the statute imposed no liability in case children were injured because of failure or neglect to fence. But later, in *Rosse v. Railway Co.*, 68 Minn. 216, 7 Am. & Eng. R. Cas., N. S., 351, 71 N. W. 20, 37 L. R. A. 591, the *Fitzgerald Case* was overruled, and it was held that the broad language of the amendment of 1877 to the statute imposing liability in all cases was sufficient to render a company liable for all damages in case of a failure or neglect to fence. Pending that case, and shortly before its decision, there was passed by the legislature chapter 346, Gen. Laws 1897; and it is contended that by reason of this amendment the law should now be construed precisely as if the amendment of 1877 had not been made, that the only object and effect of the statute is to provide damages in case of injury to domestic animals, and that since the 1897 amendment no recovery can be had for injuries to children in cases based upon failure or neglect to fence. We cannot so construe the law. It was never intended by the legislature to wipe out the amendment of 1877. Had such been the object of the amendatory statute, which is very much involved, at best, the purpose would have been clearly indicated, not left in doubt. As before stated, it was the duty of the company to fence its tracks at this particular point. The court should have charged the jury that this absolute legal duty was upon the defendant, and that its failure to fence was evidence of negligence. Order reversed, and a new trial granted.

LEWIS, J., having been of counsel, did not sit.

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Injuries to Children—Liability as Affected by Failure to Fence Railroad—Not Required to Fence against Rational Beings.—In *Nolan v. New York and New Haven R. Co.*, 53 Conn. 461, 25 Am. & Eng. R.

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Cas. 342, the persons injured were two boys, one seven and the other ten years of age. It was held that a railroad company is not required to fence its tracks against trespassers; that fences are required along its tracks to protect animals, not rational intelligent beings; that the rate of speed, the arrangement of tracks, the meeting of trains, and the absence of a fence are not circumstances which are entitled to much more weight when combined than when taken singly; and so far as they do strengthen each other they are affected by the fatal objection that the supposed duty has for its sole object the protection of wrong-doers, or at least of persons who have no excuse for being in the way of passing trains; that the tender age of the person injured can have no effect to raise a duty where none otherwise existed; and that, where certain duties exist, although infants may require greater care than adults, precautionary measures for the protection of the public must as a rule have reference to all classes alike.

Same—Same—Failure to Fence as Negligence.—In *Rosse v. St. Paul & D. Ry. Co.* (Minn.), 7 Am. & Eng. R. Cas., N. S., 351, it was *held* (overruling *Fitzgerald v. Railway Co.*, 8 Am. & Eng. R. Cas. 310, 13 N. W. 168, 29 Minn. 336), that the statute requiring railway companies to fence their roads is not exclusively designed to prevent domestic animals from straying upon the track; that where a young child, which is *non sui juris*, strays upon the track, in consequence of the failure of a railroad company to erect a fence as required by the statute, and is injured by a train, the company is liable to it for the injury.

Same—Same—Failure to Fence Considered in Determining Existence of Negligence.—In an action for negligently running over a child two and a half years of age on its track, it may be shown that the railroad company failed to fence its tracks as required by the statute. *Keyser v. Chicago & G. T. Ry. Co.* (Mich.), 19 Am. & Eng. R. Cas. 91, 56 Am. Rep. 405. In this case it was said in delivering the opinion: "The next subject claiming attention is that relating to fences. Was the omission of the company to fence its track proper matter to be taken into consideration by the jury upon the subject of negligence on the part of defendant? I think it was, and that the question was substantially settled in this court in the case of *Marcott v. Marquette, H. & O. R. Co.*, 47 Mich. 9, 4 Am. & Eng. R. Cas. 548. In that case this court, in speaking of the requirement to fence the track, said the propriety of fencing 'is explicitly declared (in the statute), and the company required to use diligence not to incur risks from the want of it.' And again, when the same case was before this court (49 Mich. 99, 8 Am. & Eng. R. Cas. 306) it held that a charge to the jury to the effect 'that if a construction of a fence at the place of injury would

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have prevented the accident and saved the child, then it was negligent in defendant not to have had a fence there,' was eminently fair, referring to the charge requested by plaintiff's counsel.

The object of the statute requiring the company to fence its track was to prevent injury from passing trains to persons and animals coming upon and using the same, and when an injury occurs without fault of the plaintiff to either in consequence of the neglect of the company to maintain the required fence, it must be held such negligence as will authorize a remedy. The child in this case was too young to know or understand anything of the danger or consequences of going upon the track before a passing train, and, of course, no wrong, fault, or negligence could properly be attributed to him in going where he did, or in doing what he did." See also, *Stuettgen v. Wisconsin Cent. R. Co.*, 80 Wis. 498; *Isabel v. Hannibal, etc., R. Co.*, 60 Mo. 475.

Child Straying on Track through Defective Gate in Right of Way Fence.—In *Stuettgen v. Wisconsin Central R. Co.* (Wis.), 50 N. W. Rep. 407, the action was brought to recover damages against the defendant company for the negligent killing of plaintiff's son, a child about two years of age. The defendant's negligence was predicted upon an alleged defective gate in its right of way fence through which the child strayed. The question was whether the child went upon the track through the open gate or through an open space at the end of the gate when closed. Two witnesses testified that they passed through the gate and closed it a few hours before the accident, and two of defendant's section men testified that they closed the gate shortly after it occurred. *Held*, that the jury was justified in finding that the gate was closed at the time of the accident; *held*, also that the defendant was guilty of negligence in not repairing the defect in the gate which had existed for several months and which the section men had been asked to repair several times.

Same—Same—Absence of Statute—Whether Failure to Fence Negligence—Instruction.—In an action against a railway company for the negligent killing of a child upon the track, where there was no statute requiring a railroad company to fence its track for the prevention of personal injuries, a charge that if a fence would have prevented such injury it was negligent not to have had it, is all that can be asked in an action therefor against the company. *Marcott v. M., H. & O. R. Co.* (Mich.), 8 Am. & Eng. R. Cas. 306.

Same—Same—Where Fence Required by City Ordinance.—Where an ordinance required such sufficient walls and fences to be maintained by a railroad as would secure persons and property from danger, and a child playing in a public park strayed upon the railway and was injured, *held*, that it was a question of fact for the jury

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whether the absence of a fence was the cause of the mishap. It is not necessary, in order to charge the company with the responsibility, that its negligence should be the efficient cause of the injury; if the injury would not have occurred but for such negligence, that is enough. *Hayes v. Michigan Cent. R. Co.*, 15 Am. & Eng. R. Cas. 394, 17 Fed. Rep. 136, 111 U. S. 228.

Same—Same—Statute Making Railroad Liable for Injuries to Stock in Absence of Fence.—Section 1289 of the Code of Iowa, providing that "any corporation operating a railway, that fails to fence the same against live stock running at large, at all points where such right to fence exists, shall be liable to the owner of any such stock injured or killed by reason of the want of such fence, or for the value of the property or injury caused, unless the same was caused by the willful act of the owner, or his agent," imposes no absolute duty upon a railway company to fence its track, and it cannot be held liable thereunder for an injury to an infant child caused by the absence of such fence alone. *Walkenhauer v. Chicago, B. & Q. Ry. Co.* (C. C.), 15 Am. & Eng. R. Cas. 490. See also, *Morrissy v. Providence, etc., R. Co.* (R. I.), 3 Atl. Rep. 10; *Smith v. Tupp*, 13 R. I. 152.

WARD'S ADM'R

v.

ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky, May 16, 1900.)

Trespassers on Track—Duty of Railroad.*—Those in charge of a railroad train, on seeing a trespasser on the track, have a right to assume that he will get out of the way, and need take no steps to stop the train, or to avoid injury to him, unless they have reason to believe that he is not aware of the danger, or unable to protect himself.

Same—Speed in Violation of Ordinance.†—In an action for injuries to a trespasser on a railroad track by a train, the fact that the train was running at a rate of speed prohibited by an ordinance of the city in which the accident happened does not constitute negligence.

*See *Baltimore & O. R. Co. v. Hellenthal* (C. C. A.), 13 Am. & Eng. R. Cas., N. S., 774, and *foot-note*.

†See *Chicago & A. R. Co. v. Winters* (Ill.), 12 Am. & Eng. R. Cas., N. S., 93, and *notes*, 103.

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APPEAL by plaintiff from McCracken county circuit court.
Affirmed.

John G. Miller, for appellant.

Quigley & Quigley and Pirtle & Trabue, for appellee.

HOBSON, J. This action was filed by appellant to recover for the death of his intestate by reason of the alleged negligence of appellee, and at the conclusion of the evidence offered by him on the trial the court peremptorily instructed the jury to find for the appellee, which was done. The deceased, George Ward, was a colored man, about 70 years of age. He was passing through the yard of appellee, in Paducah, about 2 o'clock in the afternoon, on his way home. There are a number of tracks at the point. He was walking on a side track, and got off this to let a train pass. The ground between this side track and the main track was level, but on the opposite side of the main track was a ditch 8 or 10 feet deep, the bank of which sloped up close to the main track. The deceased stopped, and picked up some strings, which he put in a basket he had with him. He also picked up a piece of board, about four feet long, and with that on his shoulder walked obliquely across the main track to the far side next to the ditch, and continued along the track on that side. A train was approaching him in front, and in plain view for at least a mile. According to the testimony of one witness who saw the occurrence, after he crossed the main track he was far enough from the track, as the witness then thought, to escape being hit by the train; and, just as the train reached him he turned, "and sorter staggered, but, if he had made one more step, he would have got down the ditch." According to another witness, he was walking slowly along the track, and, in the words of the witness, "he got over and stepped back up there. He stepped back, and the train struck him." The witness saw him step off, and then step back on, and turned away to keep from seeing the engine strike him. He was struck by the bumper on the side of the

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engine as it passed him, and from the concussion and fall received injuries from which he died. The circumstances of the case lead irresistibly to the conclusion that the old man did not want to go down into the ditch, and supposed that he was far enough off for the train to pass him, for he turned sideways just as the train reached him, and was struck by the bumper on the arm. The proof shows that the bell of the engine was ringing. It had whistled for the street crossing about 100 yards away, and was directly in front of him, and in open daylight. The rule is well settled in this state that those in charge of a railroad train, on seeing a trespasser on the track, have a right to assume that he will get out of the way, and need take no steps to stop the train, or to avoid injury to him, unless they have reason to believe that he is not aware of the danger, or unable to protect himself. Under this rule, on the facts of this case the peremptory instruction was properly given. But it is insisted that the train was running faster than the ordinances of the city allowed it to run, and that this constitutes such negligence as to make the appellee liable. While there is a conflict of authority as to the effect of municipal ordinances in cases of this character, the rule is well settled in this state that such ordinances are not admissible, and that running in violation of them is not negligence. Railroad Co. v. Dalton (Ky.), 43 S. W. 431; Dolfinger v. Fishback, 12 Bush 474. Judgment affirmed.

Trespassers on
Track—Duty of
Railroad.Same—Speed in
Violation of
Ordinance.

Southern Ry. Co. v. Harbin

SOUTHERN RY. CO.

v.

HARBIN.

(Supreme Court of Georgia, May 14, 1900.)

Injury to Employee—Employer's Liability Act—Contributory Negligence.*—The Alabama statute, now embodied in section 2590 of the Code of that state, rendering a master or employer liable to a servant for an injury "caused by reason of any defect in the construction of the ways, works, machinery or plant connected with or used in the business of the master or employer," does not prevent the defendant in an action brought under this statute from setting up as a defense that there was contributory negligence on the part of the plaintiff.

Case at Bar.—The evidence in this case demanded a verdict for the defendant.

(Syllabus by the Court.)

ERROR by plaintiff from Floyd county city court. *Reversed.*

Shumate & Maddox, for plaintiff in error.

Fouche & Fouche, for defendant in error.

LUMPKIN, P. J. The plaintiff below was an employee of the Southern Railway Company. While engaged with some of his fellow servants in shoving a loaded push car over a trestle upon one of the company's lines in the state of Alabama, he fell to the ground, and was very seriously injured. He brought an action against the company, alleging that his injuries were occasioned because of the rottenness of a wooden guard rail fastened to cross-ties constituting a part of the trestle in question. His particular complaint was that, because of the defectiveness of this guard rail, it gave way under one of his feet, and in consequence he was precipitated from the trestle. The plaintiff predicated his action

*See note at end of case.

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upon a statute of the state of Alabama, now embodied in section 2590 of the Alabama Code, which, among other things, declares that: "When a personal injury is received by a servant or employee in the service or business of the master or employer, the master or employer is liable to such servant or employee as if he were a stranger, and not engaged in such service or employment, in the cases following: (1) When the injury is caused by reason of any defect in the construction of the ways, works, machinery or plant connected with or used in the business of the master or employer." There was a verdict for the plaintiff, and the defendant filed a motion for a new trial; alleging that the verdict was contrary to law and to the evidence and to the charge of the court. The motion also assigned error upon various rulings made during the trial. We shall not, however, undertake to deal with the special grounds of the motion, because we are clearly of the opinion that upon the merits the plaintiff's recovery is not maintainable.

The evidence for the defendant tended strongly to show that the guard rail in question was sound and free from defect, and that the plaintiff's fall was purely attributable to accident or to carelessness on his part. On the other hand, the evidence introduced in behalf of the plaintiff was fully sufficient to warrant a finding that the guard rail was rotten and defective as alleged. We will therefore assume this to be the truth of the case, accepting as correct the conclusion which the jury evidently reached as to this matter. It further appeared, however, from clear and undisputed evidence, including the plaintiff's own testimony as a witness, that he was fully aware of the condition of the rail, and deliberately stepped upon it with the knowledge, as he himself stated, that it was rotten and apparently unsound. The only fair and reasonable inference deducible from the plaintiff's testimony as to this matter is that he deliberately and intentionally stepped upon a piece of timber which he knew to be rotten, without taking any precaution whatever to test its capacity to sustain his weight. Other evidence at the trial,

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which was practically undisputed, established the proposition that, in walking over the trestle for the purpose of pushing the car, the hands engaged could walk upon the cross-ties between the iron rails, or upon the guard rail, which was outside of the iron rails and very near to the ends of the cross-ties, but that the former was obviously the safer and better way of going over the trestle and doing the work of pushing the car. It also appeared that the plaintiff was nearly 20 years of age, and that he had had some experience in doing such work as that in which he was engaged at the time he received the injuries of which he complains.

The case necessarily turns upon the construction which should be placed upon the Alabama statute as applied to the facts above set forth. It therefore seems entirely proper for

**Injury to Em-
ployee—Employ-
er's Liability Act
—Contributory
Negligence.**

us to follow the decisions which have been rendered by the supreme court of Alabama with reference to this very statute, and so doing leads, we think, to the conclusion that the plaintiff was not entitled to a verdict. In the case of *Wilson v. Railroad Co.*, 85 Ala. 269, 4 South. 701, which was an action for personal injuries by an employee against the defendant company, it was held that "under statutory provisions, as at common law, contributory negligence is a defense to such action." In that case the court, speaking through JUDGE CLOPTON, discussed the statute with which we are now dealing, and distinctly held that, notwithstanding its enactment, the plaintiff's right of recovery was defeated by his own negligence contributing to the bringing about of the injury of which he complained. Again, in *Railroad Co. v. Walters*, 91 Ala. 435, 8 South. 357, the same court ruled that, "in an action for damages against the employer on account of personal injuries received by plaintiff or his intestate while in the performance of the duties of his employment (Code, § 2590), the defense of contributory negligence is available, as in an action at common law." We may therefore take it as established by the decisions of the highest court of Alabama that an employee is not entitled to recover

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damages for personal injuries when he negligently contributed to the bringing about of the same. Had the plaintiff been an adult, it is clear that his right to a recovery would have been defeated because he voluntarily assumed a dangerous risk, and in so doing did not exercise the diligence which the law requires of every person of full age and sound mind. It would be a strain to hold that this particular plaintiff did not fall within this rule; for, though not quite of age, it appears that he was a stalwart young man, of at least ordinary intelligence, and, in view of his experience, ought to have known, and doubtless did know, fully as well as a man who had attained his majority, that the experiment upon which he ventured was, according to his own version of the transaction, extremely hazardous.

But, aside from this, the defense rests upon another ground. As above stated, it was shown that there were two ways of walking across the trestle and pushing the car, one of which was safer and better than the other, and that this fact was obvious to the plaintiff. He nevertheless voluntarily chose the more dangerous way.

Case at Bar.

In this connection we cite a decision of the Alabama court rendered in the case of Railroad Co. v. George, 94 Ala. 200, 10 South. 145, in which it was held that: "If there are two apparent ways of discharging the required service, one more dangerous than the other, the employee is bound to select the latter, and is guilty of such negligence as will bar an action for damages if he selects the former and is thereby injured; and if the danger is so imminent and apparent, in either way, that a careful and prudent man would not incur the risk, he cannot recover, unless the evidence shows that the injury was caused by the reckless, wanton, or willful negligence of the defendant's employees." To the same effect, see, also, Railroad Co. v. Walters, *supra*, and Railroad Co. v. Graham, 94 Ala. 545, 10 South. 283.

The superior court ought to have sustained the motion for a new trial on the general grounds contained therein. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

Note

Employer's Liability Acts—Contributory Negligence.—That the contributory negligence of the employee shall serve as a bar to his claim under such statutes is settled by the provisions of some statutes and by the construction put upon others. *Rev. Stat. Wisconsin, 1878, p. 530, § 1816; Georgia Code of 1873, § 3036, p. 528.* See, also, *Gumz v. Chicago, etc., R. Co., 52 Wis. 672, 5 Am. & Eng. R. Cas. 583; Missouri Pacific R. Co. v. Makey, 33 Kan. 298, 22 Am. & Eng. R. Cas. 306.*

If an employee is himself guilty of negligent omission of duty, although working in accordance with directions from a fellow servant having authority to direct him, he cannot recover under *Ala. Laws 1884-5, p. 115, § 1, subd. 3*, authorizing a recovery when the injury is caused by the act or omission of any person in the employment of the master done or made in obedience to particular instructions given him by any person delegated with the authority of the master in that behalf. *Postal Teleg. Cable Co. v. Hulsey, 22 So. Rep. 854, 115 Ala. 193.*

Under the Florida statute of 1887, changing the common-law rule of the liability of railroad companies for an injury resulting to one employee through the negligence of another, an employee cannot recover damages from the company for injuries sustained by him on account of the negligence or carelessness of another employee, unless wholly without fault himself, even though in performing the act that results in the injury he was acting under the orders of a superior. *Duval v. Hunt, 34 Fla. 85, 15 So. Rep. 876.*

To entitle an employee to recover damages from his employer for personal injuries caused by the negligence of another employee, under the provisions of chapter 4071, Acts 1891, the plaintiff must himself have been free from fault. *Florida C. & P. R. Co. v. Mooney, 40 Fla. 17, 12 Am. & Eng. R. Cas., N. S., 721.*

Under *Ga. Civil Code § 2323*, providing that "if the person injured is himself an employee of the company, and the damage was caused by another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery," the employee must himself be free from fault and if the injury is sustained by him in consequence of any fault or negligence on his part, he cannot recover. *Walker v. Atlanta, etc., R. Co., 103 Ga. 820, 11 Am. & Eng. R. Cas., N. S., 498.*

Under *N. Car. Priv. Laws 1897, chap. 56*, providing that a railroad employee injured by the negligence of a fellow servant may maintain an action therefor, the defendant company is not prevented from setting up the plaintiff's contributory negligence. *Hancock v. Norfolk & W. R. Co., 32 S. E. Rep. 679.*

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LOUISVILLE & N. R. CO.

v.

LANSFORD.

(*Circuit Court of Appeals, Fifth Circuit, May 8, 1900.*)

Death by Wrongful Act—Punitive Damages—Construction of State Statute—Following State Decisions.*—The court of last resort of Alabama has uniformly construed the section of the state Code derived from the act of February 5, 1872, entitled "An act to prevent homicides" as allowing exemplary or punitive damages; and has held it to be valid. And such construction and holding are binding in an action in a federal court against a foreign railroad company for the death of a passenger in a railroad accident in Alabama.

ERROR by defendant to the circuit court of the United States for the Southern division of the Northern district of Alabama. *Reversed.*

W. A. Walker (*Mitchell A. Porter* and *Wm. M. Walker*, on the brief), for plaintiff in error.

Frank S. White and *A. O. Lane* (*Felix Blackburn*, on the brief), for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. Wiley G. Lansford, as the administrator of the estate of L. W. Martin, deceased, brought this action in the city court of Birmingham, Ala., against the Louisville & Nashville Railroad Company. The defendant, being a Kentucky corporation, removed the suit to the circuit court of the United States for the Southern division of the Northern district of Alabama. The action was for \$40,000, as damages for the alleged wrongful death of the plaintiff's intestate, a passenger on the defendant's passenger train.

*As to whether exemplary damages are recoverable for wrongful death, see extensive note, 13 Am. & Eng. R. Cas., N. S., 552 *et seq.*

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The evidence tended to show that the defendant company was engaged in operating railroads, as a common carrier of freight and passengers; a part of its line running from Birmingham to Blockton, Ala. On the line was a long bridge, about 110 feet high, commonly called the "Cahawba River Bridge." On the 27th of December, 1896, Martin took passage on one of the defendant's trains as a passenger from Birmingham to Blockton. When the train was passing over the bridge, it collapsed and carried part of the train with it into the bed of the river; falling about 110 feet. The train was demolished, and the plaintiff's intestate was killed. The part of the train which fell was destroyed by fire. The body of the plaintiff's intestate was found in the wreckage and was identified. The defendant offered evidence tending to show that the bridge was strong and in good condition. The plaintiff offered evidence in rebuttal tending to show that the timbers in the bridge at the place where the train went through were in a rotten condition, and that some of the iron of which the bridge was composed had old breaks in it, and that the bridge would sway six inches from one side to the other when trains were passing over it. The question of negligence *vel non* was left to the jury. The jury found for the plaintiff, and assessed his damages at \$7,662.50. Judgment was entered on the verdict, and this writ of error was sued out to reverse the judgment.

At the request of the plaintiff the court charged the jury that the measure of damages in the case was punitive and exemplary. The court instructed the jury to the same effect in the general charge. To the giving of these instructions the defendant excepted. The question of the correctness of these charges is here raised by several assignments of error.

At common law no action would lie for a wrongful injury causing death. The right of action in this case, therefore, is entirely dependent upon a statute. The following is the statute under which the suit is brought:

"Action for Wrongful Act, Omission, or Negligence Causing Death. A personal representative may maintain an

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action, and recover such damages as the jury may assess, for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death; such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained though there has been no prosecution, or conviction, or acquittal of the defendant for such wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate." Code Ala. 1896, § 27.

The question here presented for our consideration is whether the damages to be assessed under this statute are punitive or merely compensatory. As indicating the purpose and meaning of the legislature of Alabama in conferring the right of action for injuries causing death, it should be noted that the titles of the several acts on the subject indicate that its purpose was to prevent homicides. The act authorizing actions for wrongful injuries causing death, approved February 21, 1860, is entitled "An act to prevent homicides." Acts Ala. 1859-60, p. 42. This act was subsequently repealed. The section of the Code under consideration is derived from the act of February 5, 1872, which was also entitled "An act to prevent homicides." Acts Ala. 1871-72, p. 83. The act as originally passed provided that the personal representative of the person whose death was caused by the wrongful act might recover "such sum as the jury deem just." As the act now appears in the Code, it allows a recovery of "such damages as the jury may assess." The change is immaterial. *Railroad Co. v. Freeman*, 97 Ala. 289, 11 South. 800. In 1877 the question came before the supreme court of Alabama as to the proper construction of this statute, on the question of the

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measure of damages. The action was by the administratrix for the recovery of damages for the killing of her intestate. JUDGE STONE, delivering the opinion of the court, said :

"Charge 4 fixes an erroneous measure of damages, and was rightly refused on that account, although in other respects it may have asserted correct legal principles. Lacerated feelings of surviving relations, and mere capacity of deceased to make money if permitted to live, do not constitute the measure of recovery under the act of February 5, 1872. Prevention of homicide is the purpose of the statute, and this it proposes to accomplish by such pecuniary mulct as the jury 'deem just.' The damages are punitive, and they are none the less so in consequence of the direction the statute gives to the damages when recovered. They are assessed against the railroad 'to prevent homicides.' " Railroad Co. v. Shearer, 58 Ala. 672, 680.

The same question was again before the Alabama supreme court at the December term, 1877, and the court held—

"That the purpose and result of the suit therein provided were not a mere solatium to the wounded feelings of surviving relations, nor compensation for the lost earnings of the slain. We think the statute has a wider aim and scope. It is punitive in its purpose,—punitive of the person or corporation by which the wrong is done, to stimulate diligence and to check violence, in order thereby to give greater security to human life; 'to prevent homicides.' And it is none the less punitive because of the direction the statute gives to the damages recovered. The damages, 'tis true, go to the estate of the party slain, and, in effect, are compensatory; but this does not change the great purpose of the statute,—to prevent homicides. Preservation of life—prevention of its destruction by the wrongful acts or omission of another—is the subject of the statute, and all its provisions are but machinery for carrying it into effect." Railroad Co. v. Sullivan, 59 Ala. 272, 278.

An examination of these two cases will show that neither of them involves facts which, in the absence of the statute,

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would have required the assessment of damages punitive in character. The cases are both distinctly constructions of the statute. In 1892 the question was again before the supreme court of Alabama. JUDGE McCLELLAN (now chief justice) delivered the opinion of the court. The opinion is without dissent, and cites approvingly the construction theretofore given to the statute. The court said:

"The conception of a recovery of damages as a pecuniary mulct—a punishment of the wrongdoer as a retribution for the wrong, and deterrent of its repetition—is the leading, indeed the sole, idea upon which the conclusion was reached. Compensation is referred to only as a fortuitous result of the imposition of the punishment,—a thing which ensued not because of any intent of the lawmakers that it should ensue, and not because a predicate for it was necessary to the assessment of damages, or exerted any influence in determining the amount of the verdict, but only because, the damages having been assessed alone upon a consideration of the culpability of the defendant's act or omission, wholly regardless of the actual loss or injury suffered thereby, they constituted a fund which the statute distributed to the next of kin of the deceased; and this whether or not his next of kin would have been at all benefited by his continued life, or were to any extent damnified by his untimely death. * * * The damages recoverable being punitive and exemplary in all cases under the statute,—punitive of the act done, and intended by their imposition to stand as an example to deter others from the commission of mortal wrongs, or to incite to diligence in the avoidance of fatal casualties,—the purpose being the preservation of human life, regardless of the pecuniary value of a particular life to the next of kin under statutes of distribution, the admeasurement of recovery must be by reference alone to the quality of the wrongful act or omission, the degree of culpability involved in the doing of the act, or in the omission to act as required by the dictates of care and prudence, and without any reference to or consideration of the loss or injury the act or omission may occasion to the

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from the mere fact that Martin was sitting in a seat in defendant's passenger train, that he was a passenger, and, next, from the fact that he was a passenger on the train and was killed, to presume that he was killed through the defendant's negligence; and thus was thrown upon the defendant the burden of proving that it exercised that high degree of care which is required of the carrier of passengers for hire.

In his general charge to the jury, the trial judge instructed the jury:

"If your verdict is for the plaintiff, you will consider the amount of that verdict, and base it solely, as the decisions of the supreme court of Alabama have said, according to the degree and amount of negligence proven against the defendant, the railroad company. If the negligence was slight, the verdict should be slight. If the negligence was great and culpable, the verdict should be large. If halfway between the two, the verdict should be accordingly."

And then, at the request of the plaintiff, the court specially gave this charge:

"The court charges the jury that the measure of damages in this case is punitive and exemplary, and, if they should find from the evidence that the defendant is liable, it is their duty to impose such damages by way of punishment as will, in their judgment, prevent defendant in future from negligence causing the death of its passengers, or such as will prevent other railroads engaged in like business from being guilty of negligence which would cause the death of their passengers."

If the general charge was correct, the special charge was incorrect, and *vice versa*, with the inevitable result of misleading the jury. As I understand it, the special charge was incorrect and unwarranted. It asserts that it was the duty of the jury to impose such damages as would, in their judgment, prevent the defendant in future from negligence causing the death of its passengers, or such as would prevent other railroads engaged in like business from negligence which would cause the death of their passengers. It was a

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direct invitation and instruction to the jury to give excessive damages as a punishment in a case where, of necessity, punishment must be vicarious; for it cannot be ignored that the defendant's liability results entirely from its responsibility for the negligent acts and omissions of its servants, and that, no matter how much the defendants may be mulcted, the punishment does not reach, nor can be made to reach, the really guilty parties; for no punishment imposed upon a railway corporation, no matter how severe, can be effectual to keep its many servants guiltless of negligence for all time, —much less, the servants of all corporations engaged in similar undertakings. In *Railroad Co. v. Freeman*, 97 Ala. 294, 11 South. 801, cited in the opinion of the court to show that the law of Alabama "to prevent homicides" is constitutional, the supreme court of Alabama lays down the rule of damages as follows:

"The admeasurement of the recovery must be by reference alone to the quality of the wrongful act or omission, the degree of culpability involved in the doing of the act, or in the omission of the act as required by the dictates of care and prudence."

I understand that to mean that the recovery is to be measured by the degree of turpitude involved in the wrongful act. The character of the act is the test, and not the amount required to prevent other parties from committing like acts. In the same case it was held to be within the province of the jury to find only nominal damages. The court said:

"We do not doubt that it would be competent for the jury in actions like this to return a verdict for nominal damages only. The negligence of a defendant, while sufficient to make out a technical cause of action, and plaintiff's right to recover judgment, might yet be so slight, or so characterized by mitigating circumstances, as that the jury would be justified in the imposition of such punishment only as is involved in the assessment of merely nominal damages, since there is no question of compensation or actual damages to be considered."

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In the instant case the trial court specially instructed the jury that, if they found the defendant liable, it was their duty to impose such damages by way of punishment as would prevent other railroads from being guilty of negligence. Of course, the courts have little to do with the policy of the laws enacted by the legislature of the state of Alabama, and it may be that we are expected to follow the construction given by the supreme court of the state; but, under a law like the act "to prevent homicides," I do not think that we should go further than the supreme court of Alabama has gone in inflicting vicarious punishment. In my opinion, the judgment of the circuit court should be reversed, and the cause remanded, with instructions to award a *venire de novo*.

ILLINOIS CENT. R. CO.

v.

DAVIS.

(Supreme Court of Tennessee, April 18, 1900.)

Accident on Track—Negligence—Pleading.*—An allegation that defendant railroad had "wrongfully, carelessly and negligently run its cars and engine upon and against deceased, thereby causing his death, sufficiently states the cause of action, where the negligence relied on is failure to use due diligence in giving the danger signals after deceased was observed upon the track by those in charge of train, and the failure to ring the bell or sound the whistle within one mile of the town in which deceased was killed, as required by statute.

Contributory Negligence.†—Contributory negligence being a matter of defense, it is not necessary that its absence should be alleged.

Signals—Statute.—The railroad was not relieved of the obligation to ring the bell or blow the whistle within one mile of the town, by the fact that the state line crossed the town leaving defendant's sta-

*See generally, *note*, 11 Am. & Eng. R. Cas., N. S., 413 *et seq.*†See *Broslin v. Kansas City, M. & B. R. Co.* (Ala.), 9 Am. & Eng. R. Cas., N. S., 99, and *foot-note*.

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tion in Kentucky ; as the statute applies to all incorporated towns in the state.

Same—Failure to Obey Statutory Requirements Creating Liability When Not Proximate Cause.*—Such statutory requirement is imperative, and the breach of it gives a right of action, whether its non-observance was the proximate cause of the accident or not; and it is not complied with by sounding the bell or whistle at short intervals for a distance of one-half or three-quarters of a mile from the corporate limits of the town.

Same—Same.—Such statutory provision requires the signals to be given at the distance of one mile from the corporate limits of the town.

Wrongful Death—Damages—Evidence—Children.†—In an action under the Code of Alabama, brought by the widow for her own use for the death of her husband, evidence of the number of children of deceased, their ages, and sex is competent, although the children are not mentioned in the declaration as beneficiaries.

APPEAL, by defendant from Obion county circuit court.
Affirmed.

Moore & Wells, for appellant.

A. N. Moore, Ownby & Kellar, W. P. Caldwell, and Ad. Thomas, for appellee.

MCALISTER, J. Suit by the widow of T. W. Davis, deceased, to recover damages for the alleged wrongful killing of her husband by the railroad company. Verdict and judgment in favor of plaintiff for \$3,000. The company appealed, and has assigned errors. Case Stated.

The deceased lived in the town of South Fulton, Tenn., and at the time of the accident had started uptown, walking along or near the track of the Illinois Central Railroad Company, and was killed by a north-bound passenger train. At the time of the accident two freight trains were standing on either side of the main line, both headed south, and they had taken

*As a general rule, a railroad company neglecting a statutory precaution is never held liable unless it appears that the neglect complained of actually caused the injury. See *notes*, 13 Am. & Eng. R. Cas., N. S., 701 *et seq.*

†See Alabama Min. R. Co. v. Jones (Ala.), 8 Am. & Eng. R. Cas., N. S., 383.

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these positions in order to permit the passenger train, which was due at 12 o'clock midday, to pass along the main line north. The theory of the plaintiff is that at the time of the accident deceased was walking along the main line, and could have been plainly seen by the engineer and fireman of the north-bound passenger train for at least a half or three-quarters of a mile, and that no danger signal was given, or other precaution taken, until the proximity to deceased was so close that it was impossible to stop the train in time to prevent the accident. It was further claimed that the company had also failed to ring the bell or sound the whistle within one mile of the town of Fulton. On the other hand, the theory of the company is that deceased was not walking along the main line, but on the right of way parallel with the track; that he was seen for some distance by the engineer, but, not being on the track or in striking distance of a train, he was in no danger, and the company was not required to comply with the statute. The contention of the company is that deceased did not get on the main line until the train was within 10 feet of him, when he suddenly attempted to cross the track without looking or listening; that immediately the whistle was blown, and every effort possible in such a crisis was made, but, on account of the suddenness of deceased coming on the track in such proximity to the train, it was impossible to comply with the statutory precautions or to stop the train. Both theories, each of which was supported by evidence, were submitted to the jury, and they have resolved the issues in favor of the plaintiff.

The first assignment of error is that the court erred in not sustaining defendant's demurrer to plaintiff's declaration. The point of the demurrer is that the declaration stated no cause of action. The gravamen of the several counts of the declaration is that defendant company had "wrongfully, carelessly, and negligently run its cars and engine upon and against the deceased, thereby causing his death." No other or more specific allegations in respect of the injury are made

Accident on
Track—Negli-
gence—Pleading.

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in either count of the declaration. The assignments of demurrer were: (1) It was not alleged that deceased was without fault, and that he exercised reasonable care and caution to avoid the injury. (2) The facts constituting the negligence are not alleged, but only inferences and conclusions, and that defendant had thereby no notice of the facts it was expected to meet. In the recent case of Telephone Co. v. Cook (decided at Nashville), 55 S. W. 152, the plaintiff sued to recover damages for personal injuries sustained in consequence of a collision with a telephone pole erected on a turnpike. The specifications of negligence set out in the declaration were, *viz.*: "That defendant carelessly, willfully, negligently, and unlawfully erected a large pole firmly set to the ground on the chartered right of way of the Harpeth turnpike, a public thoroughfare, in Williamson county." It was held, on demurrer, that the averments of negligence were too general, and stated no cause of action. The simple averment that the pole of plaintiff in error was placed within the chartered right of way of the Harpeth Turnpike Company, although it was stated that it was done wrongfully, carelessly, negligently, and unlawfully, does not constitute a cause of action. To place the declaration beyond fatal objection, it was essential that it should have averred some fact or facts showing carelessness, willfulness, negligence, or unlawfulness; thus advising the defendant and the court of the grounds of complaint. The fact that the pole had been set within the chartered right of way of the turnpike company would not make the defendant liable. It had a right to set the pole at a safe and convenient distance beyond the margin of the road as made and used. Turnpike Co. v. Crocket, 2 Sneed 263. In order to constitute a ground of action, it must have been placed so as to endanger travel. The case of Oil Co. v. Shamblen, 101 Tenn. 264, 47 S. W. 496, was an action to recover damages for the negligent killing of plaintiff's intestate. The only specification of the declaration was that "defendant wrongfully and negligently killed David L. Shamblen," etc. On

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demurrer, the declaration was held fatally defective. The court quoted with approval the case of *Madden v. Railroad Co.*, 35 S. C. 381, 14 S. C. 713, in which it was said, *viz.*: "Negligence being a mixed question of law and fact, it is not sufficient to allege in general terms that an injury has been sustained by reason of the negligence of the defendant, but the plaintiff must go on, and allege the facts constituting such negligence." As already seen, the declaration in the present case alleges "that defendant company wrongfully, carelessly, and negligently run its cars and engine upon and against plaintiff's intestate, thereby causing his death." This was precisely the allegation in *Railroad Co. v. Pratt*, 85 Tenn. 9, 1 S. W. 618, in which the court held that "such an allegation gave notice that the injury was done contrary to the statute, and that the defendant will be required to prove in its defense that it observed the precautions prescribed by the same statute, although there may be no reference to the statute in the declaration." It was further said of that declaration that it gave notice that defendant has been guilty of negligence, and requires it to come prepared to show that it had neither done, nor omitted to do, any act which the law made now and before the statute negligence. We hold this declaration to be sufficient, under the authority of the last case cited.

The second ground of demurrer is that it is not alleged that the injury was sustained by the plaintiff without fault or negligence on his part. We considered this question in *Stewart v. City of Nashville*, 96 Tenn. 55, 33 S. W. 613, and held that, contributory negligence being a matter of defense, it was not necessary that plaintiff should allege or prove that he was free from fault.

The tenth assignment of error is based upon the refusal of the court to charge defendant's request, which, in substance, was that, if the jury found that there was no depot or station in South Fulton, Tenn., but that the state line between Kentucky and Tennessee crossed said town, leaving the station in Kentucky, then the requirement

Contributory
Negligence.

Signals—Statute.

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of the statute to ring the bell or sound the whistle within one mile of the town would have no application. It suffices to say, in answer to this assignment, that the statute applies to all incorporated towns in this state. South Fulton was an incorporated town, and the statute must apply, regardless of where its depot or station is situated. It is true the statute has no extraterritorial effect, but, so far as it is applicable in this state, it must be enforced.

The twelfth assignment is that the court erred in refusing defendant's request to the effect that, if the jury found that the bell or whistle on said train was sounded at short intervals for a distance of one-half or three-quarters of a mile from the corporate limits of South Fulton, in the state of Tennessee, this was a substantial compliance with the statute. We think the instruction was properly refused, for

Same—Failure to
Obey Statutory
Requirements
Creating Liability
When Not
Proximate
Cause.

the reason that the statute requires that the bell and whistle shall be sounded at the distance of one mile from the town. *Webb v. Railroad Co.*, 88 Tenn. 119, 12 S. W. 428. The statute is imperative, and the breach of it gives a right of action, whether the nonobservance of the statute was the proximate cause of the accident or not. This has been frequently held by this court. *Collins v. Railroad Co.*, 9 Heisk. 841.

The thirteenth assignment of error is based upon the refusal of the trial judge to charge defendant's request to the effect that this statute does not require that the bell or whistle shall be sounded at the distance of one mile from the corporate limits, but at the distance of one mile from the depot or station. This question was settled by this court in *Webb v. Railroad Co.*, 88 Tenn. 124,

Same—Same.

12 S. W. 428, where it was held that the provision of the statute requiring the bell or whistle to be sounded at the distance of one mile from the city or town means the corporate limits of the town or city. If this were not so, in the large cities the train would get into the city before it would be required to observe this statute, since the depot or station

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is in many instances more than a mile inside the corporate limits. The object of the statute was to give notice of the approach of this heavy and dangerous machinery, where it would be required to pass through centers of population, a sufficient length of time to thoroughly advertise its coming.

It is next assigned as error that plaintiff was permitted to prove how many children she had by deceased, their ages, and that they were all girls. It will be observed that the suit was brought by the widow for her own use, and the children are not mentioned in the declaration as beneficiaries. In *Loague v. Railroad*

Wrongful Death
—Damages—Evi-
dence—Children.

Co., 91 Tenn. 458, 19 S. W. 430, it was held by this court that, the action being maintainable alone under the statute, there can be no recovery unless both the wrongful act and the existence of some beneficiary contemplated by the statute be proven, and to be allowable on proof such facts must first be averred. The court also charged that plaintiff has a right to recover such pecuniary damages as resulted to her or the children for whose use and benefit the action was brought. It is insisted that as the declaration makes no mention of the children, and the suit was brought solely for the widow, evidence of the number of children was improperly admitted, and that the court erred in instructing the jury that the plaintiff could recover such damages as resulted to her or the children. There was no error in this action of the court. In *Collins v. Railroad Co.*, 9 Heisk. 841, it was held, *viz.*: "In any case where there are children when the action is brought under the Code, either by the widow or the administrator, the children are not necessary parties. The recovery inures to the benefit of the widow and children, and will be distributed as personal property." The court in that case also said, *viz.*: "It is further insisted that there is error in the charge of the court to the effect that in this action the jury could award the damages of the children as well as the widow when the declaration is only on behalf of the widow. It will be seen from the Code that the law itself gives direction to the recovery in such cases. The widow and the children are

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the beneficiaries of the action." In *Sample v. Smith*, 1 Tenn. Cas. 284, it was held, *viz.*: "It was not essential that the names of the children for whose use the action was brought should have been set forth. * * * The law determines who are to be entitled to the benefit of the recovery." In the case of *Spiro v. Felton* (C. C.), 73 Fed. 91, it was held, *viz.*: "In an action for damages for an injury causing death, brought for the benefit of the widow or next of kin of the deceased, evidence of the number and ages of the children of the deceased is competent." These authorities are conclusive of this question, and it results that the judgment must be affirmed.

MISSOURI, K. & T. RY. CO.

v.

ELLIOTT *et al.*

(*Circuit Court of Appeals, Eighth Circuit, April 9, 1900.*)

Refusal to Grant New Trial or Continuance—Writ of Error.—For refusal to grant a new trial or to continue a cause there can be no relief by a writ of error.

Appeal—Review—Jurors—Challenges for Cause.—The finding of a trial court that the jurors challenged for cause were qualified ought not to be set aside by a reviewing court unless manifestly erroneous.

Injury to Employee in Collision—Conflicting Orders of Train Dispatcher—Secondary Evidence.—Where the original order book and train sheets were in the defendant railroad's possession, and beyond the jurisdiction of the trial court, secondary evidence of their contents was admissible to prove alleged conflicting orders issued from the train dispatcher's office for the movement of the trains which collided, and thereby caused the death of plaintiffs' decedent. And, under such circumstances manifold copies of such orders produced, and made part of the depositions of the engineers and conductors to whom they were issued were sufficient to prove the contents of the originals.

Evidence—Refusal to Produce—Presumptions.—When the evidence tends to prove a material fact which imposes a liability on a party,

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and he has it in his power to produce evidence which from its very nature must overthrow the case made against him, if it is not founded on fact, and he refuses to produce such evidence, the presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary.

Same—Harmless Error.—It was harmless error to allow a witness to testify that the deceased fireman told the witness what was the amount of his monthly earnings; as it is a matter of common knowledge, and was also proven, that the compensation, hours of labor, etc., of firemen is fixed and regulated by contract between the railway company and the officers of the "Brotherhood of Locomotive Firemen"; and that the wage schedule is substantially uniform for all firemen in the service, on all of the railroads in the West and South.

Same—Wages Paid Employee.—An authenticated schedule showing the rate of wages paid to all classes of the defendant's employees was competent to show the wages defendant paid its firemen.

Same—Rejection of Competent Evidence—Estoppel.—When plaintiff offers and is ready to produce competent evidence to prove a material fact in issue, and the court erroneously rejects it on the objection of defendant, the latter will not subsequently be heard to say that plaintiff failed to prove the fact which the rejected evidence would have established.

Same—Objections.—An objection to evidence, to be of any avail, must show upon what ground it is made.

Harmless Errors.—Slight errors in admitting testimony are not reversible errors.

Fellow Servants—Train Dispatcher and Fireman.*—A train dispatcher in ordering the movement of trains is not a fellow servant of the firemen on such trains, but a vice principal.

Wrongful Death—Survival of Right of Action—Statute.†—The right of action for wrongful death given by the Arkansas Statute in force in the Indian Territory survives, although the death was instantaneous.

Appeal—Affirmance—Damages on Amount Superseded—Statute.—The Arkansas statute (section 1311, Mansf. Dig.) adopted and in force in the Indian Territory provides that "upon the affirmance of a judgment, order or decree for the payment of money, the collection of which, in whole or in part, has been superseded, * * *, 10 per

*See *Missouri, etc., Ry. Co. v. Elliott* (Ind. Terr.), 14 Am. & Eng. R. Cas., N. S., 587, and *note*, p. 609.

†See *Malott v. Shimer* (Ind.), 15 Am. & Eng. R. Cas., N. S., 77, and *note*.

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centum damages on the amount superseded shall be awarded against the appellant"; and such provision is obligatory upon the United States court of appeals for the Indian Territory.

ERROR by defendant to the United States court of appeals in the Indian Territory. *Affirmed.*

The Missouri, Kansas & Texas Railway Company owns and operates a line of railroad extending from the state of Missouri, through Kansas and the Indian Territory, into the state of Texas. The railway company had a train dispatcher at McAlester, in the Indian Territory, for the purpose of ordering and directing the movement of its trains on the division of its road between McAlester and Muskogee, in the Indian Territory. On the 11th day of June, 1892, the company, through its train dispatcher, ordered one of its freight trains to move southward over its track between McAlester and Muskogee, and at the same time ordered another freight train to move northward over the same track. These two trains were ordered to move in opposite directions over the same part of a single track at the same time, with the result that a head-end collision of the trains ensued without any fault on the part of the conductor or engineer of either train; the collision being due solely to the erroneous orders of the train dispatcher. In the wreck of the trains produced by the collision, William H. Elliott, a fireman on one of the trains, was killed. This action was brought by Lydia J. Elliott, the widow, and Georgia C. Elliott and Nannie F. Elliott, the children, of the dead fireman, against the railway company, to recover damages for his death. The act of negligence charged against the railway company was the issuing by the railway company of the conflicting orders which resulted in the collision and wreck of the trains. The answer was a general denial. There was a trial to a jury, which resulted in a verdict and judgment for the plaintiffs, whereupon the defendant appealed the case to the United States court of appeals in the Indian Territory, which court affirmed the

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judgment of the trial court, and thereupon the defendant removed the case by writ of error into this court.

Clifford L. Jackson, for plaintiff in error.

William T. Hutchings, Preston C. West, and Wolfe & Hare, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The protests of this court against multiplied and frivolous assignments of error seem to be of no avail. There are 103 assignments of error in this case, of which not more than 4 or 5 are of sufficient gravity to challenge or justify our attention. It was apparent from the inception of this case that, if the railway company was responsible for the results of the conflicting orders it issued for the movement of its trains, it had no defense to the merits of this action, and that the only question to be litigated was the amount of the plaintiffs' damages. It is obvious from an inspection of the record that the defendant realized this fact, and, to compensate for the lack of merits, resorted to the tactics and methods not unusual in such cases, but which it pursued with more zeal and pertinacity and carried to greater heights than common.

On the 27th day of November, 1897, the defendant filed an application for a continuance of the cause, which was overruled, and this ruling of the court is one of the principal errors assigned and insisted on.

Refusal to Grant
New Trial or
Continuance—
Writ of Error.

Nearly a century ago the supreme court of the United States said, "It may be very hard not to grant a new trial or not to continue a cause, but in neither case can the party be relieved by a writ of error." *Insurance Co. v. Hodgson*, 6 Cranch 206, 218, 3 L. Ed. 200. And this rule has been firmly adhered to from the time it was first promulgated, in *Woods v. Young*, 4 Cranch 237, 2 L. Ed. 607, to the present day, and is obligatory upon all the appellate courts of the United States. *McFaul v. Ramsey*, 20 How. 523, 15 L. Ed. 1010; *Davis v.*

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Patrick, 12 U. S. App. 629, 635, 6 C. C. A. 632, 57 Fed. 909; Manufacturing Co. v. Hess, 98 Fed. 56, 38 C. C. A. 647; Drexel v. True, 36 U. S. App. 611, 20 C. C. A. 265, 74 Fed. 12; Electric Co. v. Dick, 8 U. S. App. 99, 3 C. C. A. 149, 52 Fed. 379; Railway Co. v. Nelson, 2 U. S. App. 213, 1 C. C. A. 688, 50 Fed. 814. Moreover, the affidavit for a continuance made by the defendant's counsel did not comply in any respect with the requirements of the statute governing such applications, and was, from every point of view, wholly without merit. This clearly appears from the facts disclosed by the record, some of which we refer to here on account of their bearing on other assignments of error to be hereafter considered.

The collision which resulted in the death of the fireman, Elliott, occurred on the 11th day of June, 1892; this suit was begun on the 9th day of March, 1893; the answer was filed October 9, 1893; the defendant applied for and obtained the change of venue from one judicial division to another February 1, 1894; and the affidavit for a continuance was filed November 27, 1897. Soon after the commencement of the action, the plaintiffs, upon due notice to the defendant, took the depositions of J. F. Andrews, the conductor, and O. E. Thoman, the locomotive engineer, on the train going south, and of John Smythe, the conductor on the train going north, at the time of the collision. Engineer Thoman produced, and made it part of his deposition, the manifold copy of the train dispatcher's order under and in accordance with which he and his conductor were running the south-bound train; and Conductor Smythe, having given to one of the defendant's employees, on a promise to return it, which was not done, the manifold copy of the train dispatcher's order under and in pursuance of which he and his engineer were running the north-bound train, testified to its contents. The plaintiffs also took the deposition of John Sullivan, the defendant's train dispatcher at Denison, Tex., whose division extended from Denison to Muskogee, in the Indian Territory; the train dispatcher's office at McAlester having been re-

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moved from that place to Denison after the collision. Mr. Sullivan testified that he, as chief train dispatcher for the defendant over the division mentioned, had possession of the train sheets and order book of the company kept by the train dispatcher in the train dispatcher's office in McAlester at the time of the collision, and prior to the removal of the office to Denison; and he produced a sworn and compared copy of the train dispatcher's order to Conductor Smythe, taken from the original order book in his possession. He also testified to the movements of the colliding trains, as shown by the train sheet, up to the stations on either side of the point of collision, when there was "no further news of same." All of these witnesses were in the employ of the defendant, in the same capacity, continuously from the time of the collision down to and at the time of the trial. At the taking of these depositions the defendant appeared by counsel and cross-examined the witnesses, and the depositions were returned to the court, and from the time they were taken until the day of trial they were open to the inspection of the parties. It appears from the statements in the application for a continuance that the company took no steps to prepare for the trial of the case until about the 1st of October, 1897,—more than five years after the collision, and more than four years after suit was brought. It is averred in the affidavit that about the 1st of October, 1897, the defendant's counsel notified the claim department of the defendant company to find out and report all about the family of W. H. Elliott, to the end that it might be known whether the plaintiffs were the only proper parties entitled to sue, and the affidavit further stated "that said Mrs. Lydia J. Elliott claimed that she was still unmarried, but defendant believes, if it were given full opportunity to investigate this case, it would be able to show that she has remarried since the death of her husband, William H. Elliott, and is now well provided for, and no longer dependent upon recovering a judgment in this case," and that, if further time was given it to investigate the facts, the defendant believed it could

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show that W. H. Elliott was a "profligate man," and would not have expended on his minor children a "proper portion of his earnings." Another alleged ground for continuance was that the widow had consented in writing to a continuance, so far as she was concerned, on account of the death of her counsel; but it is nowhere pointed out how this action of the widow, which was brought about by the defendant's claim agent, operated to hinder or delay defendant in the preparation of its case for trial, nor is it pointed out by the specific statement of any fact wherein the defendant would have been any better prepared for trial if the widow had never consented to a continuance. The counsel for the defendant, who, in his affidavit for a continuance, declared he believed he could show, if the case was continued, that the statement of Mrs. Elliott that she was still a widow was false, and that she had remarried, seems to have changed his views of the lady; and he now appears deeply solicitous for her rights, and complains that "the trial court overruled this application for a continuance, and forced the case to trial in the absence of the widow, who was not represented either in person or by counsel; * * * and she had a right to be represented, and to have an opportunity to secure an attorney to take the place of the one who had died." The widow is not here making any such complaint, and the defendant's counsel cannot be heard to make it for her.

Referring to the conductors and locomotive engineers on the colliding trains, whose depositions the plaintiff had taken, the statement is made in the affidavit "that, if such reasonable time is given him in which to secure the attendance of such last-named witnesses, it will be able to show by said witnesses such a state of facts as will require the court to hold that the man Barton, whom it is claimed by the plaintiff was the train dispatcher, was a fellow servant of said W. H. Elliott." The witnesses here referred to were still in the employ of the defendant, and although they

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resided in Denison, Tex., they were subject to the defendant's orders, and could have been summoned by telegraph and reached Muskogee, the place of trial, over defendant's road, in less than half a day, at any time. Indeed, in the face of the affidavit for a continuance on the ground of the absence of these witnesses, the defendant's attorney, on the same day the affidavit was filed, objected vehemently (the objections extending over two pages of the record) to the plaintiffs reading the deposition of one of these witnesses, on the ground that "he is a witness who is as often or oftener within the jurisdiction of this court than he is out of it, and he is running on the line of the Missouri, Kansas & Texas Railway, between Denison, Texas, and Muskogee, Indian Territory, and could be reached at any time with an ordinary subpoena of this court"; and the same contention was made with reference to the two other witnesses. No one reading the affidavit for a continuance can escape the conclusion that whatever diligence was displayed by the defendant was not to prepare for the trial of the case, but to manufacture extremely flimsy and groundless pretexts for its continuance.

It is assigned for error that the court overruled the defendant's challenge for cause to three jurors. There are several sufficient answers to this assignment. It does not appear that these jurors stood in any relation to the parties that disqualified them from serving as jurors in the case, or that they had any actual bias or prejudice for or against either party to the suit; and they declared on oath that they could try the case impartially, and the court so found. "The finding of the trial court upon that issue ought not to be set aside by a reviewing court unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence." *Reynolds v. U. S.*, 98 U. S. 145, 156, 25 L. Ed. 244. For some reason

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Jurors—
Challenges for
Cause.

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not disclosed by the record before us, the names of two of the jurors challenged for cause do not appear in the panel of jurors that tried the case, and, as they "did not sit on the jury, no harm was done to defendant." *Burt v. Panjaud*, 99 U. S. 180, 25 L. Ed. 451. And, while the name of the third juror does appear in the panel, it nowhere appears in the record that the defendant exercised a single one of its peremptory challenges, so that, upon the face of the record, the defendant could have removed the juror from the panel if it desired to do so. But, as there was no valid ground of objection to the juror, it is immaterial whether the defendant had or had not exercised its right of peremptory challenge.

It is said the evidence to prove the conflicting orders issued from the train dispatcher's office for the movement of these trains was incompetent and insufficient to prove that fact. We have heretofore set out the substance of the testimony on this subject. It was not only competent, but abundantly sufficient. The original order book and train sheets were in the defendant's possession, but beyond the jurisdiction of the trial court. In apt time before the trial, the plaintiffs served on the defendant the following notice :

Injury to Em-
ployee in Colli-
sion—Conflicting
Orders of Train
Dispatcher—
Secondary
Evidence.

"In the United States Court for the Indian Territory, North-
ern Judicial Division, Sitting at Muskogee.

"*Lydia J. Elliott, et al.*, Plaintiff, v. *Missouri, Kansas &
Texas Railway Co.*, Defendant. No. 2,175.

"To Missouri, Kansas & Texas Railway Company, Above-
Named Defendant: You are hereby notified to produce at
the trial of the above-entitled cause the original train dis-
patcher's books, train sheets, and train orders concerning
movements of all trains over the line of the Missouri, Kansas
& Texas Railway between Muskogee, Ind. Ter., and South
McAlester, Ind. Ter., on the 11th day of June, 1892, and par-
ticularly all train dispatcher's books, train sheets, and train
orders specially relating to trains 1st 103 and 4th 58, alleged
in the complaint to have met with a collision between South

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Canadian and Reams on said 11th day of June, 1892. Given this 24th day of Sept., A. D. 1897.

"Lydia J. Elliott,

"By Hutchings & West, Attys.

"Service of the above notice accepted this 24th day of Sept., A. D. 1897.

"Clifford L. Jackson, Atty. for Deft."

The defendant having these records in its possession, and being able to produce them, but refusing to do so after due notice, the plaintiffs had a right to introduce secondary evidence of their contents. 1 Greenl. Ev. § 560. The operators at the stations where the train dispatcher's orders were delivered to the conductors and locomotive engineers of trains retain one of the manifold copies of all orders delivered, and it is highly probable the company had possession of the retained copy of the manifold orders issued to the conductors and engineers on these trains; but, whether it had these copies or not, it did have what was more important,—the original order book containing them, and the original train sheets showing the movements of the trains until they departed from the stations between which they were wrecked by the head-end collision and were heard of no more. Moreover, if there was any doubt or uncertainty as to the absolute correctness of the evidence relating to the orders of the train dispatcher and the train sheet, the defendant had in its power to show that fact by the production of the originals. It had had notice for years, by the depositions on file, just what the plaintiffs' evidence on the subject would be. It is a well-settled rule that when the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which from its very nature must overthrow the case made against him, if it is not founded on fact, and he refuses to produce such evidence, the presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary. "It is certainly a maxim," said LORD MANS-

Evidence—Re-
fusal to Produce
—Presumptions.

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FIELD, "that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted." *Blatch v. Archer*, Cowp. 63, 65. It is said by Mr. Starkie in his work on Evidence (volume 1, page 54):

"The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice."

McDonough v. O'Niel, 113 Mass. 92; *Kirby v. Tallmadge*, 160 U. S. 379, 383, 16 Sup. Ct. 349, 40 L. Ed. 463; *Railway Co. v. Ellis*, 10 U. S. App. 640, 4 C. C. A. 454, 456, 54 Fed. 481.

This rule is applied in criminal cases. *Com. v. Webster*, 5 Cush. 295, 316; *People v. McWhorter*, 4 Barb. 438. A case cannot well be imagined where this rule could have a more cogent application. The conclusion is irresistible that the company's refusal to produce the train order book and train sheet, which were in its possession, was because they would have conclusively convicted it of the alleged act of negligence.

It is assigned for error that a witness was allowed to state that the deceased fireman told the witness that he earned \$40 per month when he first commenced to work for the defendant company in its switch yards, and that after he got to be a fireman his wages ran from \$75 to \$90 per month. There are several sufficient answers to this assignment. This question is treated in the brief of the counsel for the plaintiff in error as though the compensation of a fireman on a locomotive engine was regulated by an independent personal contract between each individual fireman and the railroad company, the contents of which were unknown to any one else. But it has come to be common knowledge that the compensation, hours of labor, etc., of firemen is fixed and regulated by contract between the

Same—Harm-
less Error.

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railway company and the officers of the labor union known as the "Brotherhood of Locomotive Firemen," who contract for and on behalf of all firemen in the service of the company. The wage schedule is uniform for all firemen in the service, and is based on the number of miles run by the engine on which the fireman is serving, and is uniform, or substantially so, on all of the railroads in the West and South. The distance between train terminals to and from which train crews run is commonly about 150 miles, except in mountainous regions, and the average compensation of the firemen under the uniform wage schedule is from \$75 to \$90 per month. When the service is on the largest engines, or when extra hours are served, the compensation is slightly increased. All this is common knowledge, and, as we shall see, was also proven in this case.

The plaintiffs offered in evidence the "schedule showing the rate of wages to all classes" of the company's employees. This schedule was in possession of Mr. E. M. Morton, the freight and ticket agent of the company at Muskogee, one of the terminal points of the Choctaw Division of the company's road, who testified that it was issued by the general manager of the company, and that it was furnished all terminal agents who had charge of yards, or anything of that kind; that a terminal was a point where train crews run from and to; and that Muskogee and Denison were the terminal points of the Choctaw Division. The witness was a terminal agent, and, as such, had been officially furnished with, and had possession of, this official schedule of wages paid employees. But the defendant objected to its introduction, and the court sustained the objection. This schedule of wages was clearly competent for the purpose of showing the wages the company paid the firemen in its employ. The rule is well settled that when the plaintiff offers and is ready to produce competent evidence to prove a material fact in issue, and the court erroneously rejects it on the objection of the defendant,

Same—Wages
Paid Employee.

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the defendant will not afterwards be heard to say that the plaintiff failed to prove the fact which the rejected evidence would have established. The defendant will not be allowed to take advantage of his own wrong, or the errors of the court induced on his own motion, and compel the plaintiff to suffer the consequences. To allow him to do so would be a travesty on justice. It would encourage unfounded, groundless, and captious objections to evidence, and reward sharp practice and chicanery. The law of estoppel may be successfully invoked to prevent such results. Bigelow, Estop. (5th Ed.) 720; Thompson v. McKay, 41 Cal. 221; Jobbins v. Gray, 34 Ill. App. 208, 218, 219; Insurance Co. v. O'Connell, 34 Ill. App. 357, 362; Elliott, App. Proc. (1892) § 630; Railway Co. v. Harris, 27 U. S. App. 450, 457, 12 C. C. A. 598, 63 Fed. 800. Moreover, there was competent evidence to show about what the earnings of a fireman were on the company's road, if it was material to prove the fact. Elliott was a fireman on the Choctaw Division, of which Muskogee and Dension were the terminal points. The question was asked Mr. Morton, how far it was from Muskogee to Dension, but the question was either not answered, or, if answered, the answer is not contained in the record before us; but that is quite immaterial, as the distance between the two cities is a matter of common knowledge, of which the jury and the court could take notice. There was not a man in Muskogee, on or off the jury, who did not know the distance from that place to Denison, Tex., the terminal points on the Choctaw Division of the company's road, independent of the company's folder which shows it to be 157 miles. Insurance Co. v. Robison, 19 U. S. App. 266, 7 C. C. A. 444, 470, 58 Fed. 723. It was proven that firemen on the company's road were paid $2\frac{1}{4}$ cents per mile on the small engines, and "on the large engines a little more than that," and that they were paid at the same rate for extra runs. Allowing for the usual runs on freight trains on a division like this, and not

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of Competent
Evidence—
Estoppel.

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counting any extra runs, or work on large engines, would give a fireman an average monthly compensation of \$75 to \$90. This is known to all railroad men, and to all men of common intelligence living in the vicinity of railroads. The case of *Railway Co. v. Needham*, 10 U. S. App. 339, 349, 3 C. C. A. 129, 52 Fed. 371, was an action by the heirs of one who was killed while in the service of the railway company as a fireman ; and the court, speaking by JUDGE SANBORN, said, "He was a fireman earning \$75 or \$80 a month ;" and it was also said, "In the measure of damages in such an action as this, the constant factor is the practical knowledge, varied experience, and sound judgment of twelve men, and to these very much must be left ;" and, speaking of the assessment of damages by the jury, it was further said, "Indeed, if, after considering all of the evidence, they found difficulty in arriving at a conclusion by mathematical calculations based on any method of investment, they would be authorized to estimate the loss according to their own good sense and judgment." Assuming the witness' statement as to what the deceased fireman told him what wages he was getting as fireman was not competent, it was merely cumulative evidence of a fact abundantly proved by competent evidence, and which, besides, may fairly be said to be a matter of common knowledge.

But another and conclusive answer to the objection of this assignment of error is that there was no sufficient objection interposed to the hearsay evidence at the time it was introduced. After testifying that the deceased first commenced to work for the company in the switch yard, the record shows the following proceedings took place :

"Q. What wages did he get at that time? (Which question is objected to by the counsel for the defendant, which objection is overruled by the court, to which action of the court in so overruling defendant's objection defendant, by its counsel, then and there at the time duly excepted, and still excepts.) A. He told me he got \$40 a month. (Whereupon counsel for defendant objected to the answer to the last question,

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which objection is overruled by the court, to which action of the court in so overruling defendant's objection defendant, by its counsel, then and there at the time duly excepted, and still excepts.)"

It will be observed that no ground for the objection is stated. The defendant simply "objected," which, for any legal purpose, is exactly equivalent to silence.

Insurance Co. v. Miller, 19 U. S. App. 588, 8 Same—Objections.
C. C. A. 612, 614, 60 Fed. 254; Railway Co. v.
Hall, 32 U. S. App. 60, 14 C. C. A. 153, 60 Fed. 868; Min-
ing Co. v. Berberich, 36 C. C. A. 364, 94 Fed. 329.

The case of District of Columbia v. Woodbury, 136 U. S. 450, 10 Sup. Ct. 990, 34 L. Ed. 472, was an action for a personal injury, and the court said (page 461, 136 U. S., page 994, 10 Sup. Ct., and page 476, 34 L. Ed.):

"At this point of the witness' testimony in chief he was asked 'whether the book shows that this thing was received on the 29th of November.' The question was objected to, and the objection overruled. The witness answered, 'It was.' To this ruling of the court as to the question and answer the defendant excepted."

The supreme court disregarded this general exception, saying (page 462, 136 U. S., page 994, 10 Sup. Ct., and page 476, 34 L. Ed.):

"In Camden v. Doremus, 3 How. 515, 530, 11 L. Ed. 705, this court declined to consider objections made to the admission of evidence which did not state the grounds upon which they were made, and did not obviously cover the competency of such evidence, nor point to some definite and specific defect in its character. 'We must,' the court said, 'consider objections of this character as vague and nugatory, and, if entitled to weight anywhere, certainly as without weight before an appellate court.' To the same effect are Burton v. Driggs, 20 Wall. 125, 133, 22 L. Ed. 299; Patrick v. Graham, 132 U. S. 627, 629, 10 Sup. Ct. 194, 33 L. Ed. 460. This rule is especially applicable in actions like the present one, in which no fixed rule can be prescribed for measuring the

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amount of damages, and in which the result must, of necessity, depend upon the good sense and sound discretion of the jury, as controlled by the special circumstances of the case."

And while there were objections interposed to some introductory and collateral questions propounded to the witness upon the ground that they called for hearsay, there was no objection at all interposed to the question and answer now objected to, namely :

"Q. What did he get after he got to be a fireman? A. He told me his wages run from \$75 to \$90 per month."

To this question and answer no objection whatever was made. It is always allowable to interpose stringent and rigid rules to set off hypercritical and technical objections to the admission of evidence which it is extremely improbable had the slightest influence on the verdict. In *Mining Co. v. Berberich*, *supra*, this court said :

"If every slight defect or slip which a microscopic eye can detect in a question or answer or the charge of the court is to be counted prejudicial error, litigation will become interminable over subtle refinements and quibbles which were not seen or regarded by the judge or jury at the trial, and which had no bearing whatever on the decision of the case on its merits. Such an administration of the law would be intolerable. 'But there is nothing,' said JUDGE [now MR. JUSTICE] BROWN, of the supreme court of the United States, 'which tends to belittle the authority of the courts, or to impair the confidence of the public in the certainty of justice, as much as the habit of reversing cases for slight errors in admitting testimony, or trifling slips in the charge. * * * Better by far the practice of the English courts and the federal supreme court, where every intendment is made in favor of the action of the lower court, and cases are rarely reversed except for errors going to the very merits,—errors which usually obviate the necessity of a second trial.' Report Am. Bar Ass'n 1889, p. —. Though these remarks of the learned justice were not uttered from

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the bench, they express the rule upon the subject by which appellate courts should be guided, and they have our approval.

We reaffirm what was there said, and apply it to this case. The admission of incompetent evidence of a material fact is an error without prejudice, where the fact is proved by other competent evidence (*Cooper v. Coates*, 21 Wall. 105, 22 L. Ed. 481), or the party complaining of the error was instrumental in excluding competent evidence to prove the fact (see authorities *supra*), or where the fact is one of common knowledge.

It is assigned as an error that the court refused to instruct the jury that the train dispatcher was a fellow servant of the fireman. But this was not error. That the train dispatcher is not a fellow servant of the trainmen in dis-
charging the duties of the train dispatcher for
the railroad company is now as firmly settled
as any rule of law can be by judicial decisions.

Fellow Servants
—Train Dis-
patcher and
Fireman.

A railroad track is of no use to its owner or the public unless cars are run upon it. The railroad is built for that purpose. It is the movement of the trains upon the track that constitutes it a railroad. That is the consummation of the whole business. Trains will not move of their own volition. They have to be set in motion and kept moving by orders from some source. The conductors and engineers on the different trains have no authority over each other. They are required to obey orders for the movement of their trains, but can give none. The company itself can alone tell when and how its trains shall be run. That is its business, and, in the last analysis, its only business. In the orderly and safe conduct of this business, it must make a printed time-table, which is but another name for orders governing and regulating the movement of its trains under normal conditions. The making of this time-table is a legal duty of the railroad company, and, no matter upon whom the company may devolve this duty, the time-table, when made, and whether well or ill made, is the work of the railroad company, and the company

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is responsible for its results. It is not the work of the man who put it up, no matter what relation he sustains to the company. In contemplation of law, it must necessarily emanate from the supreme head or authority of the company, without regard to the hand used to promulgate or publish it. But printed time-tables alone are not adequate to meet all the requirements for the speedy, orderly, and safe movements of its trains; and for this reason the company is compelled to have recourse to the telegraph, through whose agency it makes special time-tables to meet the exigencies and requirements of the business, which are not, and cannot be, provided for in the printed time-table. Of these facts, as well as of the general duties of the train dispatcher, the courts take judicial notice. *State v. Indiana & I. S. R. Co.*, 133 Ind. 77, 81, 82, 32 N. E. 817, 18 L. R. A. 502; *Railway Co. v. Heck*, 151 Ind. 292, 312, 50 N. E. 988; *Slater v. Jewett*, 85 N. Y. 61, 68. But, whether the time-table is general or special, in print or sent by telegraph, it emanates from the railroad company (from the master), and is a duty the performance of which cannot be delegated to any servant of the company, of whatever rank, without making that servant the *alter ego* of the company, and the company liable for his negligence in the performance of that duty. The *alter ego* of the company in directing the movement of its trains by telegraph is the train dispatcher, and his orders are the orders of the company, and must be obeyed by all to whom they are addressed. The authority of the company in the premises is necessarily supreme, and its order, through its train dispatcher, must be obeyed; otherwise, inextricable confusion and destruction to life and property would be the result. It is a duty which admits of no divided authority. The train dispatcher is supreme in his sphere. No one, not even the directory itself, would presume to order the movement of a train, except through the train dispatcher, who alone, through his train dispatch book and train sheet, can issue an order for the safe movement of a train over the track. The law on this subject is well and

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succinctly stated in the case of *Darrigan v. Railroad Co.*, 52 Conn. 285. The court said:

"It is the duty of the railroad company to prepare a timetable and adjust the running of its trains so as to avoid collisions. It must also devise some suitable and safe method by which to run special and irregular trains, and regular trains when off their regular time. That cannot be done by general rules. Emergencies will arise which no rules can anticipate and provide for, in which the company must act, and act promptly and efficiently. In this case the scheme devised was with these trains, controlled by one who knew the position and movement of every train on the road liable to be affected by that,—a train dispatcher acting in the name and by the authority of the superintendent. Is there not a wide and manifest difference between the duty of such an agent and a locomotive engineer? The duty of the former pertains to management and direction; that of the latter to obedience. It is immaterial that these men are hired and paid by a common employer, and that their employment is designed to accomplish one common result. * * * The train dispatcher, then, in respect to the matter of moving the trains, is supreme. The whole power of the corporation, whose duty it was to move them safely, was delegated to him. He was the agent through whom the corporation attempted to perform its duty. He acted in its name, by its authority, and in its stead. The engineer was bound to obey his orders. Disobedience or deviation would have been subversive of order and discipline, destructive in its consequences, and just cause for immediate dismissal. * * * Reason, justice, and law require that the company shall be held responsible."

In *Hankins v. Railroad Co.*, 142 N. Y. 416, 37 N. E. 466, 25 L. R. A. 396, JUDGE (now MR. JUSTICE) PECKHAM, speaking for the court of appeals, said:

"Nor is the holding that a train dispatcher, in the dispatch of trains, performs for the master a duty which it owes as such, a new departure in the branch of the law under discus-

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sion. While the cases cited below do not necessarily proceed upon that basis, yet it is plain that it was in all of them regarded as an indisputable proposition, so far as a train dispatcher acted in ordering the movement of trains."

In *Railway Co. v. Heck*, *supra*, the supreme court of Indiana, after an exhaustive discussion of the question and review of the authorities, say (page 314, 151 Ind., and page 995, 50 N. E.):

"The contrary is held to be the law in Mississippi and in Maryland, in a qualified form, so that we are safe in saying that the overwhelming weight of judicial opinion is that a train dispatcher, charged with the duties and clothed with the powers that the one now in question was, is not a fellow servant with trainmen in the employ of the railroad company, but is a vice principal, for whose negligence the company is liable."

An examination of the cases confirms this statement of the court. We cite the cases: *Hankins v. Railway Co.*, 142 N. Y. 416, 37 N. E. 466, 25 L. R. A. 396; *Dana v. Railway Co.*, 92 N. Y. 639; *Sheehan v. Railway Co.*, 91 N. Y. 332; *Slater v. Jewett*, 85 N. Y. 61; *Darrigan v. Railroad Co.*, 52 Conn. 285; *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. 514; *Hunn v. Railroad Co.*, 78 Mich. 513, 44 N. W. 502, 7 L. R. A. 500; *Railroad Co. v. Barry*, 58 Ark. 198, 23 S. W. 1097; *Railroad Co. v. McLallen*, 84 Ill. 109; *Smith v. Railway Co.*, 92 Mo. 359, 4 S. W. 129; *Washburn v. Railroad Co.*, 3 Head 638; *Railway Co. v. Arispe*, 5 Tex. Civ. App. 611, 23 S. W. 928, 24 S. W. 33; *Railway Co. v. Camp*, 31 U. S. App. 213, 229, 13 C. C. A. 101, 65 Fed. 35; *Clyde v. Railroad Co. (C. C.)*, 69 Fed. 673; *Railway Co. v. Frost's Adm'x*, 44 U. S. App. 606, 21 C. C. A. 186, 74 Fed. 965; *Railway Co. v. Heck*, 151 Ind. 293, 306-315, 50 N. E. 988; *McKune v. Railroad Co.*, 66 Cal. 302, 5 Pac. 482; *Phillips v. Railway Co.*, 64 Wis. 475, 25 N. W. 544; *Flannegan v. Railway Co.*, 40 W. Va. 436, 21 S. E. 1028; *Railway Co. v. De Armond*, 86 Tenn. 75, 5 S. W. 600; *McKinney, Fel. Serv.* (1890) § 143.

The counsel for the plaintiff in error in their brief cite and

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rely on *Robertson v. Railroad Co.*, 78 Ind. 77, as establishing a different doctrine; but that case was expressly overruled by the case of *Railway Co. v. Heck*, 151 Ind. 292, 50 N. E. 988.

It is said that, as "Elliott suffered instantaneous death in the collision in question, any right of action for damages on account of negligence on the part of the railway company died with Elliott, and did not survive to these defendants in error." This contention was put at rest by the decision of this court in *Coal Co. v. Bevil*, 27 U. S. App. 96, 10 C. C. A. 41, 61 Fed. 757; *Broughel v. Telephone Co. (Conn.)*, 45 Atl. 435.

Exception is taken to the assessment of 10 per cent. damages, upon the affirmance of the judgment appealed from, by the United States court of appeals in the Indian Territory. The Arkansas statute (section 1311, Mansf. Dig.) adopted and in force in that territory, and obligatory upon the United States court of appeals, provides:

"Upon the affirmance of a judgment, order or decree for the payment of money, the collection of which, in whole or in part, has been superseded, as provided in this chapter, 10 per centum damages on the amount superseded shall be awarded against the appellant."

It will be observed that the statute is mandatory, but, if it were otherwise, and the damages had been assessed by the court, in the exercise of its discretion, for delay, we should not disturb the order on this record. The judgment of the United States court of appeals in the Indian Territory and the judgment of the United States court for the Northern district of the Indian Territory are affirmed.

SANBORN, Circuit Judge (dissenting). The nature and kind of service rendered and of control and direction exercised by a train dispatcher on a division of a railroad differ in no respect from the nature and kind of service rendered and of control and direction exercised by a conductor of a

Wrongful Death
-Survival of
Right of Action
-Statute.

Appeal-Affirmance-Damages
on Amount
Superseded-
Statute.

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train between stations (*Railroad Co. v. Conroy*, 20 Sup. Ct. 85, Adv. S. U. S. 85, 44 L. Ed. —); by the foreman of a gang of laborers, engaged in repairing sections of a railroad, who has power to hire and discharge the hands who compose the gang, and exclusive charge of their direction and management in all matters connected with their employment (*Railroad Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 944); of an engineer who is regarded as conductor, and has the direction and control of his engine and fireman (*Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772); of a foreman who has the power to hire and discharge men under him, and to direct them when, where, and how to work in the construction of a sewer in a city street (*City of Minneapolis v. Lundin*, 19 U. S. App. 245, 58 Fed. 525, 7 C. C. A. 344); of a foreman who has the power to hire and discharge the men at work under him, and to control and direct their acts in grading a street in a city (*Balch v. Haas*, 36 U. S. App. 393, 20 C. C. A. 151, 73 Fed. 974); and of a section foreman who directs and controls the action of the section men who work under his charge (*Railway Co. v. Waters*, 36 U. S. App. 31, 16 C. C. A. 609, 70 Fed. 28); and as these various superior servants are fellow servants with their subordinates, under the decisions cited, so is a train dispatcher upon a division of a great railroad, in my opinion. There is no difference in the nature of the relation of a train dispatcher of a division of a great railroad to the trainmen, whose movements he directs, and that of the relation of a conductor to the trainmen on his train; of an engineer, who is regarded as conductor, to his firemen; of a section boss to the men of his gang; or of a foreman of a force of laborers, whose action he has the power to direct and control, to the men in his charge. In each case the subordinate servants are required to render implicit obedience to their superior. In each case the superior servant is himself a subordinate, who works under the direction of a superintendent or general manager. In each case the superior servant and his

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subordinates are "all co-workers to the same end," regardless of their rank; and in neither case does the superior servant discharge any absolute duty of the master, or have the entire management of all his business, or of a separate and distinct department of his business. In the last analysis, the proposition that the train dispatcher is not a fellow servant of his subordinates rests upon nothing but the superior servant doctrine,—upon nothing but the fact that he has the right to give directions for the operation of the trains which are moved by his co-workers on the particular division of the railroad upon which they all happen to be at work. The train dispatcher of a division of a great railroad is not discharging any absolute duty of the master. Those duties are to use reasonable care to employ competent servants, to exercise ordinary care to furnish and maintain a reasonably safe railroad and equipment, and perhaps to exercise ordinary care to adopt and promulgate reasonable written or printed rules for the operation of the railroad. The train dispatcher of a division discharges neither of these duties. He does not make rules for the operation of the road. He and the trainmen on his division operate the road in accordance with the rules established by others. He is not charged with the duty of selecting other servants. He does not discharge the master's duty of using ordinary care to furnish or to maintain a reasonably safe railroad and equipment. He is not engaged in his master's duty of furnishing and maintaining the railroad and equipment, but in discharging his own duty of assisting his co-workers to operate the railroad and equipment which the master furnishes and maintains upon the particular division to which he is attached. The railroad and equipment constitute the great machine which the master furnishes for his employees to operate. His duty of furnishing and maintaining a safe machine extends only to its construction, preparation, and repair. It stops at the line of operation. The duty of careful and safe operation is the

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duty of the servants to whom he intrusts that function. The test of liability for an accident here is the nature of the negligence that caused it. If it was negligence in the construction and repair of the great machine, it was the negligence of the master. If it was negligence in the operation of the railroad,—in the running of its trains,—it was the negligence of the servant. The fact is unquestioned in this case that the negligence which caused the accident was not in the construction, preparation, or maintenance of the railroad or equipment, but it was the negligence of a servant in the operation of that equipment. It was not, therefore, the negligence of the master in the discharge of his duty of construction, preparation, or maintenance. *Railway Co. v. Needham*, 27 U. S. App. 227, 232, 11 C. C. A. 56, 59, 63 Fed. 107, 110, and cases cited. The train dispatcher in this case therefore was not engaged in the discharge of any absolute duty of the master. Nor was he intrusted with the entire management and supervision of all the business of this railroad company, or with the entire management and supervision of a distinct and separate department of its business. He was nothing but one of the subordinates of the superintendent or manager of the railroad company, engaged with all his co-workers in the operating department of the company in assisting to move its trains. He was under the same obligation and duty to obey the directions of the superintendent or general manager of the operating department of this railroad that the conductors in his division were to obey his orders, and that the firemen and engineers were to obey the directions of their conductors. Thus, it may be seen that the only basis for the conclusion that this train dispatcher was not a fellow servant of the trainmen at work on the same division with him is that he was superior to them in rank, and that his service, while it was that of obedience to his superior, the superintendent or manager, was that of control and direction of the trainmen who were moving the trains on the division he was assisting them to operate.

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It is true that authorities almost without number can be cited from the decisions of the courts in support of the position that an employee who has the direction and control of those working with or under him is the *alter ego* of his master, and not the fellow servant of his subordinates, and that the master is liable for his negligence. This is what is termed the "superior servant doctrine," and it has been the favorite theory of many courts, and at one time received the favorable consideration of the supreme court of the United States. *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184 28 L. Ed. 787. The later decisions of that court, however, and of the federal courts that follow its rulings, have utterly repudiated this doctrine, and have firmly established the following rules of law: All who enter the employment of a common master to accomplish a common undertaking are *prima facie* fellow servants. Those to whom the master intrusts the entire supervision and control of all his business, or of a distinct and separate department of a large and diversified business, and those to whom the master intrusts the discharge of his absolute duties of selecting employees, of furnishing a place for them to work and materials for them to work with, and perhaps of making rules for the conduct of his business, are not, while they are discharging these specific duties, the fellow servants of the other employees of the common master. But these servants, when they are discharging other than these specific duties, and other servants at all times, are the fellow servants of all others engaged in the common undertaking for the common master. Neither the fact that one servant is superior in rank or higher in grade than others, nor the fact that the duty of one is to order and direct the movements of others, while the duty of the others is to obey the orders and directions of their superior, will abrogate or affect their relation of fellow servants, or constitute the superior a vice principal, unless he is intrusted with the entire management of all his master's business, or of a distinct and separate department of a large and diversified business. Every servant who enters the

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employment of the common master assumes the risk of the negligence of his co-workers in the common undertaking, whose duty it is to direct his work and to order him when, where, and how to do it, just as much as he does that of those servants whose duty it is to work by his side and to obey the orders of the superior servants. Railroad Co. v. Conroy, 20 Sup. Ct. 85, Adv. S. U. S. 85, 44 L. Ed. —; Railroad Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 944; Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; City of Minneapolis v. Lundin, 19 U. S. App. 245, 7 C. C. A. 344, 58 Fed. 525; Balch v. Haas, 36 U. S. App. 393, 20 C. C. A. 151, 73 Fed. 974; Railway Co. v. Waters, 36 U. S. App. 31, 16 C. C. A. 609, 70 Fed. 28; Millsaps v. Railway Co., 69 Miss. 423, 13 South. 696; Railroad Co. v. Hoover, 79 Md. 253, 29 Atl. 994, 25 L. R. A. 710; Blessing v. Railway Co., 77 Mo. 410; 2 Bailey, Pers. Inj. §§ 2061, 2190; Railroad Co. v. Poirier, 167 U. S. 48, 17 Sup. Ct. 741, 42 L. Ed. 72; Oakes v. Mase, 165 U. S. 363, 17 Sup. Ct. 345, 41 L. Ed. 746; Railroad Co. v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; Railroad Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009; Railroad Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; Randall v. Railroad Co., 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; Farwell v. Railroad Co., 4 Metc. (Mass.) 49; Holden v. Railroad Co., 129 Mass. 268; Clifford v. Railroad Co., 141 Mass. 564, 6 N. E. 751; Sherman v. Railroad Co., 17 N. Y. 153; Besel v. Railroad Co., 70 N. Y. 173; De Forest v. Jewett, 88 N. Y. 264; Weger v. Railroad Co., 55 Pa. St. 460; Coal Co. v. Jones, 86 Pa. St. 432.

Under the above rules, which seem to me to be sustained by the foregoing authorities, and to be now firmly established by the latter decisions of the supreme court, the train dispatcher in this case, whose duty it was to direct the movement of trains on one of several divisions of this railroad, was, in my opinion, a fellow servant of all his co-workers in the operating department of the plaintiff in error below its

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superintendent or general manager ; and for that reason the railroad company was not liable for his negligence. The deceased assumed the risk of that negligence when he entered the employment of the common master for the purpose of carrying on, in conjunction with this train dispatcher, the common undertaking of operating the railroad of the plaintiff in error. The trial court refused to declare this to be the law, and the court of appeals in the Indian Territory sustained that ruling. For this reason it seems to me that the judgments below should be reversed.

The ruling to which reference has been made is not, in my opinion, the only error in the trial of this case. There were several errors,—notably, the refusal of the trial court to instruct the jury that they should not consider the testimony of Broyles, which was mere hearsay, in assessing the damages. But the fundamental error has already been discussed, and no good purpose would be subserved by prolonging this opinion to consider less important mistakes.

HUNT

v.

HURD.

(Circuit Court of Appeals, Seventh Circuit, Jan. 2, 1900.)

Death of Employee—Making Flying Switch—Whether Negligence Per Se.*—Deceased was killed by a car being shoved against him in making a flying switch, in broad daylight, while he was on a side track in defendant's yards. He had worked in such yards for several months, and had seen, and must have known of, this practice of making flying switches ; and he was distinctly notified by his foreman to get off and keep off the track, as they were going to make a flying switch upon it, and all the other employees took heed to the warning, and deceased paid enough attention to it to get off with the others until the engine and two attached cars passed, and then, ap-

*See note at end of case.

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parently to resume his work of tightening bolts on the track, stepped upon the track and was killed by the car. *Held*, that making a flying switch under such circumstances was not negligence *per se*.

~~Same—Same—Fellow Servants.~~^{*}—In such action, there could be no recovery for the negligence of the brakeman or foreman or other employees in charge of the train, as they were fellow servants with deceased.

~~Same—Same—Same—Local and General Laws.~~—Whether such employees were fellow servants with deceased was not a question of local law, but one of general law, to be determined by a reference to all the authorities; and the decisions of the United States supreme court are controlling upon the subject.

ERROR by defendant to the circuit court of the United States for the Southern district of Illinois. *Reversed*.

This is an action by the administrator of Edward M. Hurd against Samuel Hunt, receiver of the Toledo, St. Louis & Kansas City Railroad Company, for damages arising from

the death of said Hurd, a section hand, at
Case stated.

Coffeen, Ill., on February 8, 1898. The declaration is in two counts, which are substantially alike, charging the defendant company with negligence in carelessly and negligently making a running or flying switch, and, without notice or warning to Hurd, causing a car to run upon the side track upon which he was working, throwing him down, passing over him, and causing his death. At the time of the accident Hurd had been in the employ of the receiver for about four months, working as a section hand in the yards of the company at Coffeen and immediate vicinity. Coffeen is a village of about 1,000 inhabitants. The main track of the railroad company runs through the village, east and west, crossed at right angles by Main street and other streets running north and south. A short distance west of Main street is the depot. Sixty feet west of the depot is a side track or "passing track," so called, which leaves the main track, and extends west through the village north of, and parallel with, the main track. A track called a "house track" joins this side track at a point 180 feet from the west

^{*}See *note*, 14 Am. & Eng. R. Cas., N. S., 586.

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end of the depot, and extending in easterly direction over Main street. About 1,080 feet west of the depot is situated the coal shaft of the Coffeen Coal Copper Company. For the purpose of handling the business of this coal shaft another side track leaves the main track at a distance of about 210 feet west of the depot, running parallel with the main track to the coal shaft. About 330 feet from the coal shaft two short side tracks branch out from this track, running parallel with it past the coal shaft, and rejoining the side track at a point about 390 feet west of the shaft. All of the tracks south of the main track were at the time of the accident used for loading and shipping coal from the coal shaft. There are two other railroads crossing between the coal shaft and the depot. Prior to the accident Hurd and a fellow workman, James Crites, were engaged in tightening bolts on the side track. Both were working under the orders of William Jones, foreman of the section. Between 2 and 3 o'clock p. m., a local freight train came into the yards from the east, stopping east of the depot. As there was a car of coal to be taken from the coal shaft and shipped out with this train, the engine was detached, and the remainder of the train left standing east of the Main street crossing while the engine went up the side track to the coal shaft to get this car. The section gang, among whom was Hurd, were then at work on the side track. When the engine went up to the coal shaft, the men stepped off the track, resuming their work after the engine had passed. The foreman, Jones, was standing close to Hurd when the train passed, and Crites was standing about 40 feet east of Hurd. There were three cars of coal standing on the side track near the coal shaft, the one to be shipped out in this train being the furthest west. The engine coupled onto this string of three cars and started east towards the depot; the intention being to drop the last car, which was a flat car loaded with slack, upon the house track, north of the depot, by detaching it from the string before the engine reached the switch, allowing the engine and two cars attached to pass out onto the main track,

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and then, before the detached car reached the switch, setting the switch for the house track, allowing that car to run onto that track by the momentum it had acquired before its detachment. the engine could then return with the two cars onto the side track, leaving them at the place where they had been previously picked up, and bring out the car from the house track, and couple it to the train left on the main track east of the depot. A brakeman was placed on the last car, and the engine, with all three cars attached, returned towards the depot. When this train was about five or six hundred feet from the section gang where Hurd was working, Jones, the foreman, told the men to get off the track and to stay out of the way; that the train crew were going to drop a car back, or to throw a car in there,—the exact words being differently given by different witnesses. The import of the warning, however, was that a car was going to be placed on the house track by a process known to railroad men as a drop or flying switch. When the engine was about 100 feet from the place where the men were working, they stepped off the track, and about the same time the brakeman on the last car uncoupled that car from the string the engine was pulling. To do this, the speed of the engine was slackened, in order to allow the drawing of the pin; and after the pin was drawn the speed of the engine was increased, so that the engine and two cars passed the sectionmen at the rate of about four or five miles an hour, according to the testimony of the witnesses Jones and Benson, or eight to ten miles an hour, according to the evidence of other witnesses. The sectionmen were standing on the main track when the engine and two cars passed them. The engine and cars were running two or three car lengths ahead of the detached car. As soon as the engine with the cars attached had passed him, Hurd, without looking to the west, from whence the car was coming, stepped upon the switch track, astride of the south rail, and bent down, apparently for the purpose of proceeding with his work. The detached car was then rapidly approaching, and was within 30 feet of

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him. Several bystanders shouted to him to get out of the way, but it was too late, and the car struck him and passed over him, killing him almost instantly. The accident happened between 2 and 3 o'clock on a clear day. The brakeman on the detached car was standing at the west end of the car, where the brake was placed, and, by reason of his position, probably would not be able to see Hurd when he stepped upon the track. The car was stopped just after it passed the switch onto the house track. During the time of Hurd's employment, the coal company was shipping all of its coal over the Toledo, St. Louis & Kansas City Railroad, and a great deal of switching was done in those yards, there being as many as 15 to 20 cars taken from the coal shaft and scales daily. In doing this work, running switches were of almost daily occurrence, and they had been frequently made in Hurd's presence. There is no substantial conflict in the testimony, or any dispute as to the facts of the case. The questions arising from the record are questions of law. The defendant company called but one witness, Section Foreman Jones, whose testimony in all material matters supports the plaintiff's proofs. At the close of the testimony the defendant's counsel requested the court to direct the jury to find a verdict in favor of the defendant, which request the court refused, but submitted the case to the jury, who found a verdict in favor of the plaintiff. The principal assignment of error, and the only one which we deem it necessary to consider, is founded upon this refusal of the court to take the case from the jury.

Clarence Brown, for plaintiff in error.

George R. Cooper, for defendant in error.

Before WOODS, Circuit Judge, and BUNN and SEAMAN, District Judges.

BUNN, District Judge, after making the foregoing statement of the case, delivered the opinion of the court.

It is impossible to discover any rational or satisfactory ground upon which this verdict can be sustained. There

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was no evidence in the case that the switching of cars upon side tracks by a running switch is of itself dangerous or unlawful. It is not claimed to be the law that such a practice is unjustifiable, or constitutes negligence *per se* on the part of the railroad company. The truth is that it is the common practice in most or all of the railroad yards in the country. It is claimed in this case that a separate engine could have been attached to these particular cars, and the cars drawn behind or shoved ahead of such engine with greater safety to employees and the public. That is quite possible. If an employee will not take heed to such a warning as was given Hurd in this case,—to get off the track and keep off,—he might be saved by the fury of an approaching engine, and the noise of a whistle and the ringing of a bell. But this does not furnish any solution to the question. Because the business might be done in some other and slower way, less dangerous, it does not follow that the method employed involves negligence. The real question is whether the method is the one in general use by other railroad companies, and is reasonably safe. If it is, then it is not negligence of itself, and without regard to circumstances, to employ that method. 3 Elliott, R. R. par. 1162; Kelley v. Railroad Co., 53 Wis. 74, 9 N. W. 816; Schaible v. Railway Co., 97 Mich. 318, 56 N. W. 565, 21 L. R. A. 660. A railroad company has, say, a half dozen or more cars standing in its yards, which it wishes to place upon as many different side tracks. Instead of hitching a separate engine to each car, and taking the car where it is wanted, it attaches one engine to the entire train. When all is under motion the engine is suddenly slacked up. This slack is communicated from the engine through all the intermediate cars until it reaches the rear car. This enables the brakeman to draw the pin and detach that car just at a point before it reaches the first switch, which is drawn at the proper moment, allowing the detached car to go upon another track by the momentum received from the engine. The engine with the remaining cars proceed upon their way until another side track and

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switch are reached, when the same process is repeated, and so on until all the cars are deposited in their proper places. Where there are no public streets to be crossed, and the traveling public are not concerned, it cannot be said that such a method of moving cars is extrahazardous, or implies any negligence on the part of the company. It facilitates business, and that is what the public want, although the danger may be somewhat increased over that of slower methods. It would, no doubt, be less dangerous to employees and to the public if all passenger trains should be run at a speed not exceeding 10 miles an hour, instead of from 30 to 60 miles an hour, and yet no one would venture the opinion that it should be held as negligence *per se* to run trains at the higher rate of speed. The business public demands it, notwithstanding the extra hazard. There is no doubt that under some circumstances it would be gross carelessness to shunt a train upon a side track, leaving it to run across a grade crossing over a public street where footmen were constantly passing, without an engine and an engineer to control it. The cases cited from Illinois, and relied upon by the defendant in error, are, for the most part, cases of this kind, where the traveling public are interested, and where there are grade railroad crossings over public streets. But there are no such extraordinary circumstances in this case. Here the switching was done in the defendant's yards, upon its own private grounds. It was done in the usual manner, in broad daylight. The deceased was an employee of the company. He had worked in those yards several months, and had seen, and must have well known of, this practice of making flying switches. He was distinctly notified by his foreman to get off and keep off the track, as they were going to make a drop switch upon that track. All the other employees took heed to the warning, except Hurd. He paid enough attention to it to get off with the others until the engine and two attached cars passed, and then, forgetting or for some reason being totally oblivious of the approach of the shunted car, stepped upon the track, apparently to resume his work of fastening

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bolts. The other workmen, Jones and Crites, knew about the danger, and heeded it. Hurd knew just as much about it as they did, but was the only one who paid no attention to or failed to realize the danger.

It is said that the jury are to judge of the circumstances, and draw their own inferences from facts. This is true, where there are circumstances and testimony from which inferences may properly be drawn. But the difficulty lies in the fact that there are no circumstances in evidence from which the inference of negligence on the part of the company, or of any employee of the company, can properly be drawn. The court, in its general charge, instructed the jury:

Death of Em-
ployee—Making
Flying Switch—
Whether Negli-
gence Per Se.

“That they were to judge in the first place (for that is most important) whether this so-called running or flying switch was such an operation of the road, or of the switch, or switching of cars, as was reasonably compatible with the safety of the parties employed to work there. If it was reasonably safe, then the party employing the deceased, perhaps, had complied with his undertaking; but if it was not a reasonably safe operation, so to speak, of the engine and cars,—of the switching process that was going on there,—then perhaps the defendant would be guilty.”

This instruction and others of a similar import were objected to, and exception thereto taken by defendant's counsel. We mention these things here only for the purpose of saying that it seems altogether probable, from these instructions and from the verdict, that the jury supposed they were authorized to say that if they found these flying switches to be dangerous, or more dangerous than other methods that might have been employed, in that case they should find the defendant company guilty of negligence. But this, as we have seen, cannot be the law. And apparently the jury must also have found that the contributory negligence of the deceased in going upon the track in front of a moving car after being warned by his foreman of the

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danger would not prevent a recovery, if the jury found this method of switching dangerous. The instructions, however, on the subject of contributory negligence were quite correct and full. It is true that there is evidence to show that the yard was within the corporate limits of a village of 1,000 or 1,200 inhabitants, and that 30 or 40 feet away was a public street crossing. But how can these facts change or influence the duty of the company to the employee Hurd? Not at all. If he had been a traveler upon the public crossing, then the question in regard to the propriety of switching a car over the crossing without an engine attached would have some significance.

As we have seen, the charges of negligence in the declaration are of a very general character. No specific negligence is alleged on the part of the engineer or brakeman or other employee in charge of the switching train. The charge is apparently one of negligence on the part of the company for operating cars in that way, as though it were negligence *per se*. And the question seems to have been left to the jury as a question of fact, though there are no circumstances in the case tending in any way to show negligence, unless it was the bare fact of switching cars by a flying switch, so that the jury were in reality left to determine the law as well as the fact.

Counsel for defendant in error lay some stress upon the fact that the brakeman sent in charge of the shunted car was located on the rear end of the car, instead of the front. But he was where his brake was by which the car was controlled, and he was not there for the ^{Same-Same} ~~Fellow Servants~~ purpose of giving warning. Other means were provided for that. But assume that the brakeman was negligent in not being in the right place. It is quite clear that the plaintiff cannot recover for the negligence of the brakeman or foreman or other employees in charge of the train. They were fellow workmen with the deceased. This is not a question of local law, as is claimed by counsel for the

Note

defendant in error, but is one of general law, to be determined by a reference to all the authorities. Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772. And the decisions of the United States supreme court are controlling upon this question. Martin v. Railroad Co., 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051; Railroad Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 944; Same v. Charless, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999. These cases are quite conclusive of the case at bar, so far as any question of negligence on the part of the engineer or brakeman in charge of the train is concerned, if any such negligence were charged or proven. But no such negligence is charged, and, if it were, there is no evidence tending to support the charge. The judgment of the circuit court is reversed, and the case remanded, with instructions to award a new trial.

NOTE.

Making Flying Switch—Whether Negligence Per Se.—A company is not guilty of negligence *per se* in shunting by kicking cars along its tracks in its yard, for the purpose of making up trains, pursuant to a custom of long standing, of which its employees are fully cognizant. Schaible v. Lake Shore & M. S. R. Co., 97 Mich. 318, 56 N. W. Rep. 565.

Shifting cars by means of the "kicking back" process is not necessarily at all times an act of negligence *per se*, even though there may be a safer method of shifting them. Florida Cent. & P. R. Co. v. Mooney (Fla.), 12 Am. & Eng. R. Cas., N. S., 721.

The use of "kicking switches," or "running switches," in detaching and propelling cars, cannot be said to constitute negligence, as "they seem to be in general use by well-regulated railroads"; but there may be negligence in connection with their use, by failing to instruct a young and inexperienced brakeman as to the attendant danger. Williams v. South & N. Ala. R. Co., 91 Ala. 635, 9 So. Rep. 77.

The tracks of two companies at the place of an accident ran within a few feet of each other. Plaintiff, a track repairer, suddenly jumped from one track to defendant's to avoid a passing train, and while waiting for the train to pass, was struck by uncoupled cars moving by their own momentum, with no one in charge, on defendant's road. *Held*, that defendant was guilty of negligence in moving the cars in such a manner; that plaintiff, under the circumstances, could not be chargeable with such contributory negligence as to bar a recovery. Chicago, R. I. & P. R. Co. v. Dignan, 56 Ill. 487, 4 Am. Ry. Rep. 487.

Beal v. Atchison, etc., Ry. Co

BEAL

v.

ATCHISON, T. & S. F. RY. CO.

(*Supreme Court of Kansas, Oct. 6, 1900.*)

Personal Injuries—Contributory Negligence—Knowledge of Reckless Habits.—One who, with knowledge of the grossly negligent and reckless habit of another, voluntarily and unnecessarily places himself in the way of receiving injuries at his hands, is guilty of contributory negligence, and cannot excuse himself upon the ground that the conduct of the other was wanton and willful in character, unless such other had knowledge or apprehension that he was about to inflict injury, and made no effort to avert it.

Injury to Employee—Contributory Negligence—Choosing More Hazardous Way.*—A workman engaged in cleaning stock cars standing on a railroad track, who has knowledge of the grossly negligent and wantonly reckless habit of the railway company to bump other and moving cars against them without warning, and who is injured by such negligent conduct while he is endeavoring to cross the track by crawling under the cars, when there was a safer way to get across, and who might have heard or seen the approach of the moving cars had he look or listened, is guilty of contributory negligence, and a recovery cannot be had for his injuries or death, unless the railway company before bumping the cars had knowledge or apprehension of his perilous position, and made no effort to avoid injuring him.

(Syllabus by the Court.)

ERROR by plaintiff from Wyandotte county court of common pleas. *Affirmed.*

C. C. Dail, L. F. Bird, and H. G. Pope, for plaintiff in error.

A. A. Hurd, O. J. Wood, and W. Littlefield, for defendant in error.

DOSTER, C. J. This was an action brought against the Atchison, Topeka & Santa Fe Railway Company by Caro-

*See note, 18 Am. & Eng. R. Cas., N. S., 555.

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line Beal, widow of Daniel Beal, to recover damages for negligently causing her husband's death. The deceased was a workman employed, with others, to clean the defendant's stock cars. The place where the death occurred was in the company's yards at Argentine, this state. At that place there were a number of contiguous and parallel tracks running east and west. The track furthest to the north was called the "Alley Track." Upon that track the cars to be cleaned were switched. The method of placing the cars upon this track was to run them from the Kansas City stock yards, a few miles distant, upon the track next to and immediately south of the alley track, to a switch connection a quarter of a mile or more west of the point at which they were to be cleaned, and then to back them east upon the alley track. The cleaning was done by shoveling the refuse matter out of the north sides of the cars. In order to get into the cars to do this work, it frequently became necessary to cross from the south to the north sides of the cars as they stood upon the track. Beal undertook to make this crossing by crawling under one of the cars. At that moment another train of stock cars sent out for the purpose of being cleaned was backing in from the west on the alley track. It bumped into the standing cars, and ran one of them over Beal, causing his death. The jury made findings, of which the following is a full summary: Beal, at the time he was hurt, was crossing the alley track from south to north, under the cars. He did not know before undertaking to cross that the moving train of cars was about to bump into the standing train of cars, nor had any warning been given to him and his fellow workmen of the approach of the train backing in from the west. It was his habit and that of his fellow workmen to cross from one side of the alley track to the other by crawling under the cars and over and under their connecting bumpers. The stock cars to be cleaned were brought from the stock yards, and placed upon the alley track, daily and several times a day. It was the custom to bring trains of empty stock cars from the stock yards every

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morning, and at other times during the day, on the tracks parallel to the alley track, and, after passing the point where the deceased met his death, to back them in from the west upon the alley track, and it was a daily occurrence for the moving trains backing in from the west to bump against the standing cars in which the men were working, and it was also a daily occurrence, while the workmen were cleaning the cars for switch engines, to move and handle the cars in and about which the men were working. Beal knew that the standing cars upon the alley track were liable at any time to be bumped into and moved by the incoming cars or switch engines running against them, and before his injury he had been cautioned about the danger of crawling under the standing cars. None of the duties of the men engaged in cleaning the cars required them to go under such cars in the performance of their work. The deceased could have gotten into his car from the south side without crossing over to the north side. The cars he was engaged in cleaning were provided with step-ladders, by which men could climb over them from one side to the other. By stepping a few feet to the south between the alley track and the one next to it, just before Beal started to crawl under the car, he could have seen the train backing in on the alley track, and he could also have heard the engine and cars composing the moving train. It was the custom of the defendant to move the cars in which the men were working without giving any warning signal other than ringing the bell, and it was also the custom of the defendant not to give signals to the men working about the alley track of the approach of its trains upon such track or of its intention to move the cars standing upon it. Such custom not to give warning signals had existed for several years, and Beal knew of it. There was a safer way to cross from the south side to the north side of the train of cars on the alley track than the one undertaken by Beal. The jury, however, did not specifically state what such safer way was. Inferably, however, it was to climb the step-ladders, and go

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over the tops of the cars, or go around the end of the train. None of the employees of the defendant in charge of the train backing in on the alley track knew that Beal was crawling under one of the standing cars. No signal or warning was given by any one of the approach of the train backing in on the alley track. The deceased was 68 years old. In addition to these findings, the jury returned a verdict for the plaintiff. Upon motion of the defendant, this verdict was set aside, and judgment rendered upon the findings for it, and against the plaintiff. The plaintiff has prosecuted error to this court.

It would appear from the findings that the defendant was negligent in backing its moving cars against the standing ones, around which the men were at work, without the giving of any warning signals of approach. Counsel, upon oral argument, endeavored to exculpate the company by claiming that, on account of the number of trains all the time moving to and fro in the yards at Argentine, the giving of sounding signals was impracticable, because signals given by one train were liable to be mistaken by other trains, for which they were not intended. No reference was made to any portion of the record justifying such exculpatory plea, and therefore we cannot take it into account. Besides, the ringing of bells and sounding of whistles are not the only ways of giving warning of the approach of trains. We can conceive of no reason why the sending of a man in advance of the backing train to give warning of its approach might not have been practicable. We conclude, therefore, that the defendant was negligent; and, for the purpose of considering the claim of liability made against it by the plaintiff, will assume, as contended by her, that it was grossly and willfully negligent.

On the other hand, it must also be held that Beal was negligent,—negligent to as great an extent as the defendant. He knew that moving cars were liable to back in upon the standing cars at any time. He knew that it was not customary to give signals or other warnings of their approach.

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He knew that it was therefore dangerous to crawl under the standing cars. He knew that there was a safe way to cross over from one side of the track to the other. Had he stepped a few feet to the south, he could have both seen and heard the approaching train backing in on the alley track. It is impossible, in reason, therefore, to say that he was not guilty of negligence directly contributing to his own death. This, in fact, is admitted by counsel for plaintiff. It is contended, however, that a plea of contributory negligence upon the part of the injured person will not lie as against a charge of gross, wanton, and willful negligence upon the part of the one who inflicts the injury, and in support of this contention the following quotation is made from JUDGE COOLEY's work on Torts (2d Ed. 810): "When the conduct of the defendant is wanton and willful, or when it indicates that degree of indifference to the rights of others which may be justly characterized as recklessness, the doctrine of contributory negligence has no place whatever, and the defendant is responsible for the injury he inflicts, irrespective of the fault which placed the plaintiff in the way of such injury.

This is a trenchant and radical statement of law, and would seem to be comprehensive of the facts of the present case, and to justify the plaintiff's claim of defendant's liability. However, an examination of the authorities cited in support of the proposition, and a reading of the remainder of JUDGE COOLEY's text upon the subject, materially qualify the broad terms in which the rule is stated. In immediate connection with the above, it is further stated by JUDGE COOLEY that "the fact that one has carelessly put himself in a place of danger is never an excuse for another purposely or recklessly injuring him. Even the criminal is not out of the protection of the law, and is not to be struck down with impunity by other persons. If, therefore, the defendant discovered the negligence of the plaintiff in time, by the use of ordinary care, to prevent the injury, and did not make use of such care for the purpose, he is justly chargeable with reckless injury, and cannot rely upon the negligence of the plaintiff as a

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protection; or it may be said that in such a case the negligence of the plaintiff only put him in position of danger, and was therefore only the remote cause of the injury, while the subsequently intervening negligence of the defendant was the proximate cause."

It will thus be seen, and especially when examined in the light of the authorities cited, that the rule of nonliability for contributory negligence in case of injuries wantonly, willfully, or recklessly inflicted, does not apply

Personal In-
juries—Contrib-
utory Negligence—
Knowledge of
Reckless Habits.

where the injured person had or should have had knowledge of the grossly negligent habit or the impending reckless act of the injurer, and could have avoided their consequences by prudence and caution upon his own part. Only when an act of contributory negligence is performed without knowledge or apprehension that the reckless and wanton conduct of another will or may conjoin to produce an evil effect will the injured person be relieved from liability for the result of his own negligence. To say that one alive to the known or probable misconduct of another may nevertheless expose himself to the dangers known or liable to result from such misconduct, and yet exculpate himself from the consequences upon the ground of the other's fault, would go to the complete subversion of the whole doctrine of liability for contributory negligence. One who thus tempts fate cannot be heard to complain of the harshness of its decrees. However, when one, although negligent himself, has no knowledge or can have no apprehension of the liability of another's negligence conjoining with his own to produce an injurious effect, but the latter has such knowledge or can have such apprehension, but wantonly and recklessly proceeds to the fatal consequence, when by diligence and caution he might have avoided it, the former will be held guiltless, and the latter liable, because in such case the proximate cause of the injury is not the former's negligence, but it is the negligence of the latter in failing to see that the former had negligently placed himself in a position of peril. It is in respect to cases compre-

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hensive of such a state of facts that the rule of JUDGE COOLEY and of all the cases cited by counsel for plaintiff in error was declared. The precise subject is discussed at length in Beach, Contrib. Neg. (3d Ed.) § 54 *et seq.*, and 2 Thomp. Neg. 1155 *et seq.*, and the distinction we have drawn pointed out, and the view we have expressed illustrated and enforced.

The contention of the plaintiff that persons have a right to work at dangerous employments, and that it cannot be said as matter of law that they are negligent in doing so, and that Beal assumed no risks of the dangerous employment of cleaning out stock cars, is apart from any question which the facts of the case raise. Admitted that the business of clean-

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ing the cars was dangerous; admitted, notwithstanding this fact, that Beal had the right to work at it; admitted that he assumed none of the risks of that employment except such as were necessarily incidental to it,—nevertheless the risk of getting killed by crawling under the cars, as a result of the company's negligence, of which he had knowledge, and against which he could have guarded was not a risk which he did not voluntarily and unnecessarily assume. Furthermore, the claim of plaintiff that Beal had the right to practice the dangerous habit of crawling under the cars because that was the usual and ordinary habit among his fellow workmen is untenable. One cannot recklessly expose himself to known or probable dangers because others are in the habit of doing likewise. The judgment of the court below is affirmed.

JOHNSTON, J. (concurring specially). I concur in the judgment of affirmance upon the theory that the injury was not willfully and wantonly inflicted by the defendant. If it had been done purposely and by design, it would have constituted more than negligence, and become an act of aggression and violence, and contributory negligence would not avail as a defense. It is well settled "that, if the ordinary negligence of the plaintiff directly or proximately contrib-

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uted to the injury, he cannot recover unless the injury was intentionally and wantonly caused by the defendant." *Railway Co. v. Adams*, 33 Kan. 427, 6 Pac. 529; *Tennis v. Railway Co.*, 45 Kan. 503, 25 Pac. 876. The contributory negligence of the plaintiff was clearly established, and, under the circumstances of this case, it necessarily defeats a recovery.

SMITH, J., not sitting, having been of counsel in the case.

SOUTHERN RY. CO.

v.

HOWARD.

(*Supreme Court of Georgia, June 5, 1900.*)

Ejection of Passenger—Expiration of Ticket.*—No right of action accrues to a passenger upon a railway train for ejection therefrom when it appears that under a reasonable regulation of the company the ticket which he offered as his right for transportation was limited as to the time in which the carriage was to be performed, and such limit had expired. *Railway Co. v. Lippman* (March term, 1900) 36 S. E. 202.

Passenger on Freight Train—Discharge of Passengers.—One who takes passage upon a freight train to a designated city is entitled to carriage thereon only to the point or place in such city or its suburbs at which the run of this train upon its usual and regular schedule is terminated, and cannot demand the right to be transported thereon to a station to which only passenger trains of the company are carried for the discharge of passengers.

Case at Bar.—Applying the rules above announced to the facts of the present case, the verdict in the plaintiff's favor was contrary to law, and ought to have been set aside.

(Syllabus by the Court.)

ERROR by defendant from Monroe county superior court.
Reversed.

Dessau, Harris & Birch and Cabaniss & Willingham,
for plaintiff in error.

*See note, 11 Am. & Eng. R. Cas., N. S., 251; *Trezona v. Chicago G. W. Ry. Co.* (Iowa), 12 Am. & Eng. R. Cas., N. S., 104 and footnote.

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Bateman & Gaines, O. H. B. Bloodworth, J. B. Williamson, and Westmoreland Bros., for defendant in error.

PER CURIAM. Judgment reversed.

FISH, J., absent on account of sickness.

GARLAND

v.

SOUTHERN RY. CO.

(*Supreme Court of Georgia, July 13, 1900.*)

Injury to Passenger on Freight Train—Negligence in Stopping Train.*—Where a petition, in an action against a railway company for personal injuries, alleged, in substance, that the plaintiff was a passenger upon a freight train of the defendant; that, at the request of the conductor, he occupied a seat in the upper part of the cab, and remained there until the train reached the outskirts of the town to which he was going, when, the train coming to a full stop, which the plaintiff thought was for the purpose of allowing him to get off, he, in order to get his effects together, preparatory to leaving the train, followed the conductor to the lower part of the cab, where the conductor left him standing, saying to him, "Stay here until we pull up to the depot, and you can then get out;" that the train then moved forward rapidly, and plaintiff, for the purpose of seeing when he reached the depot, stood by a window of the cab, holding firmly to the window, in such a position as to protect himself against all ordinary and usual jerks and jars incident to a freight train; that while he was in this position the train, by reason of the negligence of the defendant's employees in charge thereof, was suddenly, and without warning, stopped, with such a tremendous, unusual, and unnecessary shock as to jerk plaintiff's hands loose from the window, so violently wrenching them from their hold upon the window as to tear a ring and the flesh from one of his fingers; that the shock overturned buckets of water in the car, moved several inches an iron stove, which was fastened to the floor, and threw the plaintiff violently against some obstacle in the car and to the floor, rendering him for a time unconscious; that he sustained very serious injuries, the nature and extent of which, his sufferings therefrom, his earning capacity before, and for a stated period after, the injury, and the pecuniary amount of his damages, being all set forth,—*held*, that the petition set forth a cause of action, and should not have been dismissed upon demurrer.

(Syllabus by the Court.)

*See note at end of case.

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**ERROR by plaintiff from Henry county superior court.
Reversed.**

Lloyd Cleveland, for plaintiff in error.

C. E. Battle, for defendant in error.

NOTE.

Carriers of Passengers on Freight Train—Degree of Care.—As to degree of care to be exercised by a carrier of passengers on freight train, see *note* to *Smedley v. Hestonville, M. & F. Pass. Ry. Co.*, 9 Am. & Eng. R. Cas. 649, 657.

If a company admit a person into a caboose attached to a freight train, to be transported as a passenger, and take the customary fare for his transportation as such, it incurs the same liability for his safety as though he had taken passage in one of its regular passenger coaches or trains. *New York, C. & St. L. R. Co. v. Doone*, 37 Am. & Eng. R. Cas. 87, 115 Ind. 435, 15 West. Rep. 465, 1 L. R. A. 157, 7 Am. St. Rep. 451, 17 N. E. Rep. 913; *Edgerton v. New York & H. R. Co.*, 39 N. Y. 227, affirming 35 Barb. 389; *Maher v. Manhattan R. Co.*, 53 Hun (N. Y.) 506, 26 N. Y. S. R. 742, 6 N. Y. Supp. 309; *Steele v. Southern Ry. Co. (S. Car.)*, 14 Am. & Eng. R. Cas. 350; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Cleveland, P. & A. R. Co. v. Cunan*, 19 Ohio St. 1, 2 Am. Rep. 362; *Lawson v. Chicago, St. P. M. & O. R. Co.*, 64 Wis. 447, 54 Am. Rep. 634; *New York Central R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Illinois C. R. Co. v. Beebe*, 174 Ill. 13, 11 Am. & Eng. R. Cas., N. S., 163; *Indianapolis, B. & W. R. Co. v. Beaver*, 41 Ind. 493; *Indiana, I. & I. R. Co. v. Masterson*, 16 Ind. App. 323, 44 N. E. 1004; *Ohio & M. R. Co. v. Dickinson*, 59 Ind. 317.

CUTLER

v.

CONCORD & M. R. R.

(*Supreme Court of New Hampshire, July 28, 1899.*)

Findings—Review.—The finding of the trial court that the excluded evidence had no legitimate bearing in the case for the purposes for which plaintiff claimed to use it, because of remoteness, presented no question of law on appeal.

Injury to Intoxicated Passenger—Evidence to Show Purchase of Beer in Station.—In an action for injury to a passenger while he was intoxicated, evidence to prove that he purchased beer, shortly

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before the accident, at a restaurant in defendant's passenger station, was not admissible for the purpose of showing that defendant was bound to exercise more care for his safety because his condition was attributable to such beer, nor for the purpose of showing that it was sold illegally.

EXCEPTIONS by plaintiff from Hillsboro county. *Exceptions overruled.*

David W. Perkins, Taggart & Bingham, and James F. Briggs, for plaintiff.

Oliver E. Branch and William H. Sawyer, for defendants.

SHORTER

v.

SOUTHERN RY. CO.

(*Supreme Court of Alabama, April 19, 1899.*)

Injury to Employee—Contributory Negligence—Going between Moving Cars to Make Coupling in Violation of Rule.*—Deceased, without necessity, and in violation of a rule of the railroad company forbidding him to go between cars, either of which is in motion, to couple or uncouple them, got between cars, one of which was in motion, and was killed in consequence of being there. *Held*, that his violation of the rule was such contributory negligence as to bar recovery for his death; and the fact that his death was caused by the dislocation and falling of the trucks with which the moving car was loaded was immaterial in this connection.

APPEAL by plaintiff from Birmingham city court. *Affirmed.*

Bowman & Harsh, for appellant.

Smith & Weatherly, for appellee.

*See *Carrier v. Union Pac. Ry. Co.* (Kan.), 17 Am. & Eng. R. Cas., N. S., 513, and foot-note.

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STATE

v.

SOUTHERN PAC. CO.

(Supreme Court of Louisiana, March 5, 1900.)

Powers of Foreign Corporations.—A corporation can exercise in another state no power or authority which is not granted to it by the charter under which it exists, or by some other legislative act. *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 9 Sup. Ct. 409, 130 U. S. 1, 32 L. Ed. 837.

Carriers of Freight—Right to Take out Warehouse License.—A railroad corporation is not authorized to receive, as being for purposes incidental to its business as a common carrier, a license under Act No. 101 of 1886. The license granted thereunder contemplates a permanence in the storage of goods received, which is inconsistent with the regular and legitimate business of a common carrier. The rights, duties, and obligations of the latter and those of a warehouseman are separate and distinct. Railroad corporations are common carriers. Warehousemen are depositaries for hire or reward.

Same—Warehouse Business—Ultra Vires.—A railroad corporation is not authorized to receive for storage for hire in warehouses, as being incidental to its business as a common carrier, goods and merchandise which are not received by it under and from shipments over its road. It is authorized to receive them for storage from and under shipments from and for its roads, to the extent that such storage is in fulfillment of its obligations as a common carrier, and not otherwise.

Same—Same—Same.—The storage of goods for hire in its warehouses by a railroad corporation is not incidental to its business, when it is made under either an express or implied special or general agreement with shippers or consignees, either before or at the time of shipment or receipt of goods, that they should be received and held for storage for hire, either for a fixed period, or at the will of the shippers and consignees. Permanent storage is not incidental to railroad business. That business calls for a rotation in storage as immediate and prompt as the railroad corporations can make it.

(Syllabus by the Court.)

APPEAL by plaintiff from parish of Orleans civil district court. *Reversed.*

Milton J. Cunningham, Atty. Gen. (E. Howard McCaleb, of counsel), for the State.

Denegre, Blair & Denegre, for appellee.

Farrar, Jonas & Kruttschnitt, amici curiæ.

Abstracts

SANDBERG

v.

ST. PAUL & D. R. Co.

(*Supreme Court of Minnesota, July 14, 1900.*)

Crossings—Duty to Look for Train.—*Held*, in crossing a steam railroad on a public crossing at a place where there were only double tracks, and the vision was unobstructed, the plaintiff was guilty of contributory negligence in looking but once, and that before reaching the tracks.

(Syllabus by the Court.)

APPEAL by defendant from Ramsey county district court.
Reversed.

Hadley & Armstrong, for appellant.

Sheehan & Thomas, for respondent.

LEWIS, J., delivering the opinion, said: "The rule has been established in this court over and over again that one who attempts to cross a railroad track under such circumstances must use his own senses continuously. Ordinary prudence requires this. No less stringent rule would be practicable. Another principle is as well established,—that a person crossing as the plaintiff was cannot rely upon the signals to remind him of danger. He is bound to be awake and alive for his own protection. There may be cases where, on account of numerous tracks, frequently passing trains or obstructions, a person would be required to look but once. There may be cases where the noise and confusion of approaching or passing trains would tend to confuse, and under those circumstances reasonable allowance must be made. But, according to the facts presented in this record, we can find no extenuating circumstances. Order reversed, and a new trial granted.

Abstracts

MCGRAW

v.

CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Nebraska, Dec. 19, 1899.)

Negligence—Definition.—The following definition: "Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do,"—*held* not incorrect. *Electric Co. v. Laughlin*, 63 N. W. 941, 45 Neb. 404.

Appeal—Review.—If the bill of exceptions in a cause has been quashed, questions, the decision of which necessarily calls for an examination of the evidence, cannot be considered.

Instructions—Appeal—Review.—If the instructions contain statements which may have been correct, and applicable to possible conditions of the proof in the case, they must be presumed without error, in the absence of a bill of exceptions.

(Syllabus by the Court.)

ERROR by plaintiff to Lancaster county district court. *Affirmed.*

Lamb & Adams, for plaintiff in error.

W. F. Evans, L. W. Billingsley, and R. J. Greene, for defendant in error.

PROVOST

v.

YAZOO & M. V. R. CO.

(Supreme Court of Louisiana, June 9, 1900.)

Pedestrian on Railroad Bridge—Duty to Stop, Look, and Listen.*—It is not sufficient for a person about to cross or walk along a railroad track or into or upon a railroad bridge or trestle, to stop, look, and listen at any time prior to doing so. The stopping, looking, and

*See generally, *Central of Georgia Ry. Co. v. Forshee et al.* (Ala.), ante 467, and *foot-note*; *note*, 12 Am. & Eng. R. Cas., N. S., 341 et seq.

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listening must be done at such a time and place as to make it effective and sufficient to save the situation. When the law requires steps of diligence and caution, it will not be satisfied by the substitution therefor of vain and useless acts. *Snider v. Railroad Co.*, 18 South. 695, 48 La. Ann. 12.

Same—Assumption of Risks.—A person selecting, for his own convenience, a dangerous route to a city instead of a safer one, and in passing into a bridge or trestle (a place of danger, according to his own theory) with full knowledge of the dangers he might encounter from doing so, voluntarily takes upon himself risks, the results of which he cannot shift at will upon other parties.

Same—Same.—It is not enough that a person voluntarily placing himself in a position requiring steadiness of nerve should entertain the hope or belief that he has the necessary firmness. The belief must be justified by the fact. He cannot speculate on the subject.

Same—Same—Dangerous Methods for Escape.—Parties claiming damages for personal injuries are sometimes relieved from the charge of contributory negligence by reason of having, in a case of sudden danger, had recourse to injudicious methods for escape; but those are cases where the first act upon which the charge is made to rest is this erroneous selection of a way to safety, not where the party is already chargeable with acts of contributory negligence of which this particular act is the mere supplement.

(Syllabus by the Court.)

APPEAL by defendant from parish of Orleans civil district court. *Reversed.*

Farrar & Lemle and *Hunter C. Leake* (J. M. Dickinson and James Fentress, of counsel), for appellant.

Boatner, Dodds & Boatner and *R. G. Cobb*, for appellee.

LAKE ERIE & W. R. CO.

v.

COMMISSIONERS OF HANCOCK COUNTY *et al.*

(*Supreme Court of Ohio, May 22, 1900.*)

Necessity for County Ditch—Question for Jury—Evidence—View by Jury.—Where, upon an inquiry as to the public necessity of a contemplated county ditch, the evidence tends to prove that its construction will afford needed drainage to a considerable body of low lands,

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or marshes, or ponds, or to one or more public highways, or to public school grounds, the question should be submitted to the jury, under proper instructions, whether the ditch will be conducive to the public health, convenience, or welfare; and on that inquiry the jury may consider as evidence facts brought to their knowledge from their actual view of the proposed route, made as provided by statute.

Same—Same—Eminent Domain.—It is competent for the jury to find in favor of the public utility of the ditch in the sense that will justify the appropriation of lands for its construction, if it will be conducive to the public health, convenience, or welfare of the neighborhood through which it is located. A more general public necessity is not required.

Eminent Domain—Damages.—Any direct encroachment upon land, which subjects it to a public use that excludes or restricts the dominion and control of the owner over it, is a taking of his property, for which he is guaranteed a right of compensation by section 19 of the bill of rights.

Same—County Ditch across Railroad Right of Way.—The location and construction of a public ditch across or upon the right of way of a railroad company, though the ditch be constructed by tiling under the surface, is an appropriation of the company's property, which entitles it to compensation for the value of the interest so taken.

Same—Same—Same—Compensation.—When, in the construction of such a ditch, it will become necessary to make an excavation under the tracks of the railroad, and for the company to incur expense in supporting the tracks, or otherwise, while the ditch is being constructed, such expense should be taken into account in estimating the damages of the company, and a refusal to so instruct the jury is error.

(Syllabus by the Court.)

ERROR by railroad company to Hancock county circuit court. *Reversed.*

Jason Blackford, Aaron Blackford, and John B. Cockrum,
for plaintiff in error.

Charles E. Jordan and John Poe, for defendants in error.

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NORTHERN OHIO RY. CO.

v.

COMMISSIONERS OF HANCOCK COUNTY.

(*Supreme Court of Ohio, May 22, 1900.*)

Construction of County Ditches—Authority of County Commissioners.—County commissioners have authority, under section 4447 of the Revised Statutes, to order, in the same proceeding, a ditch to be located, constructed, and tiled. It is not required that there shall first be an open ditch constructed, and thereafter a separate proceeding to have it tiled.

Same—Same—Change of Terminus.—Under section 4448 of the Revised Statutes the commissioners may change either terminus of a ditch before its final location, when, in their opinion, the object of the improvement will be better accomplished thereby; and their official action making the change raises the presumption that there was legal cause therefor.

Same—Railroad Right of Way.—It is not a valid objection to the establishment of a tiled ditch that it is located in part, longitudinally or otherwise, on the right of way of a railroad company, unless it is made to appear that the proper use of the right of way by the company will be thereby defeated.

County Ditch across Railroad Right of Way—Compensation.—The syllabus in the preceding case (57 N. E. 1009), except the fifth paragraph, is applicable to questions involved in this case, and is here adopted.

(Syllabus by the Court.)

ERROR by railway company to Hancock county circuit court. *Reversed.*

John B. Cockrum and Jason Blackford, for plaintiff in error
Charles E. Jordan and John Poe, for defendants in error.

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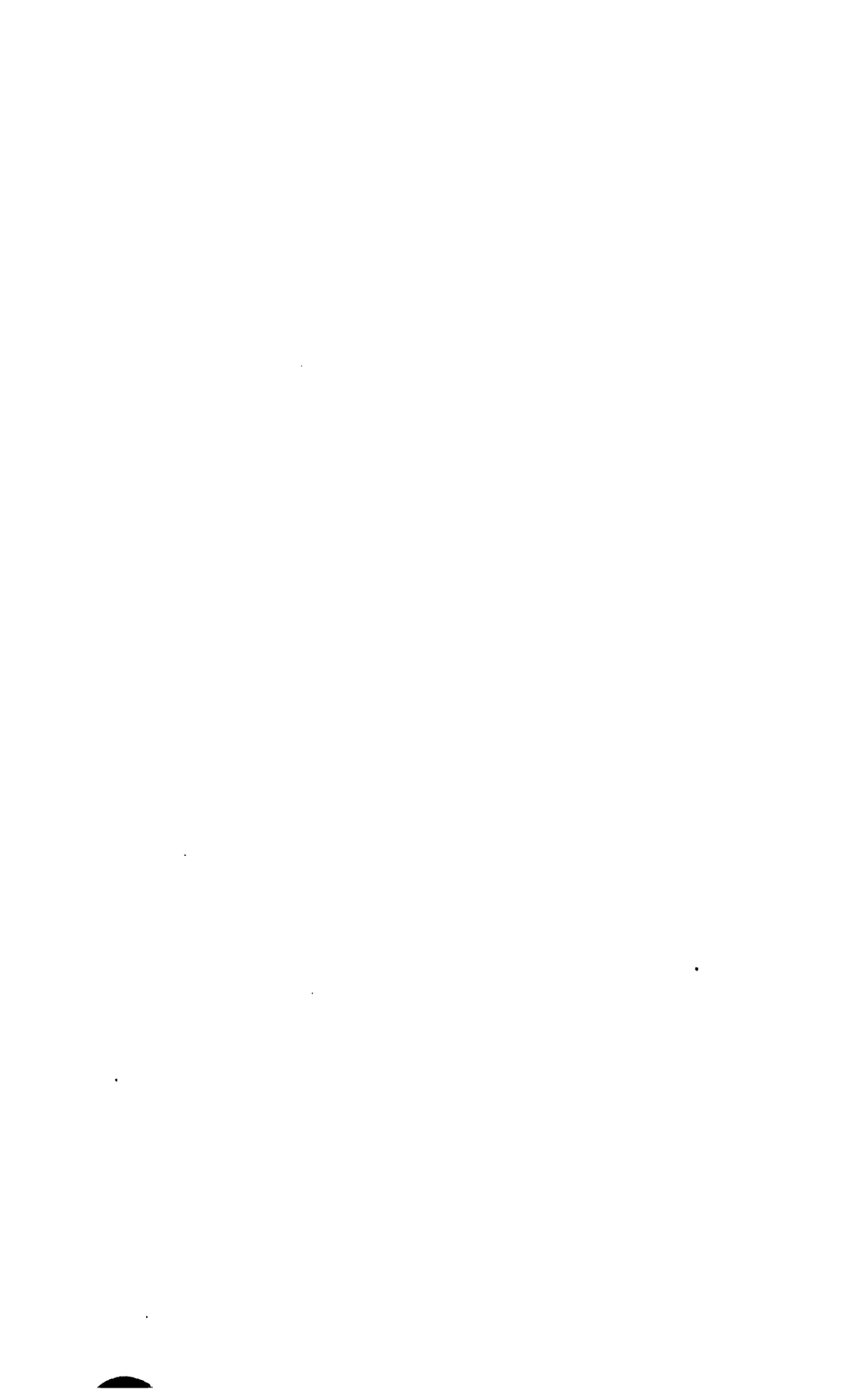
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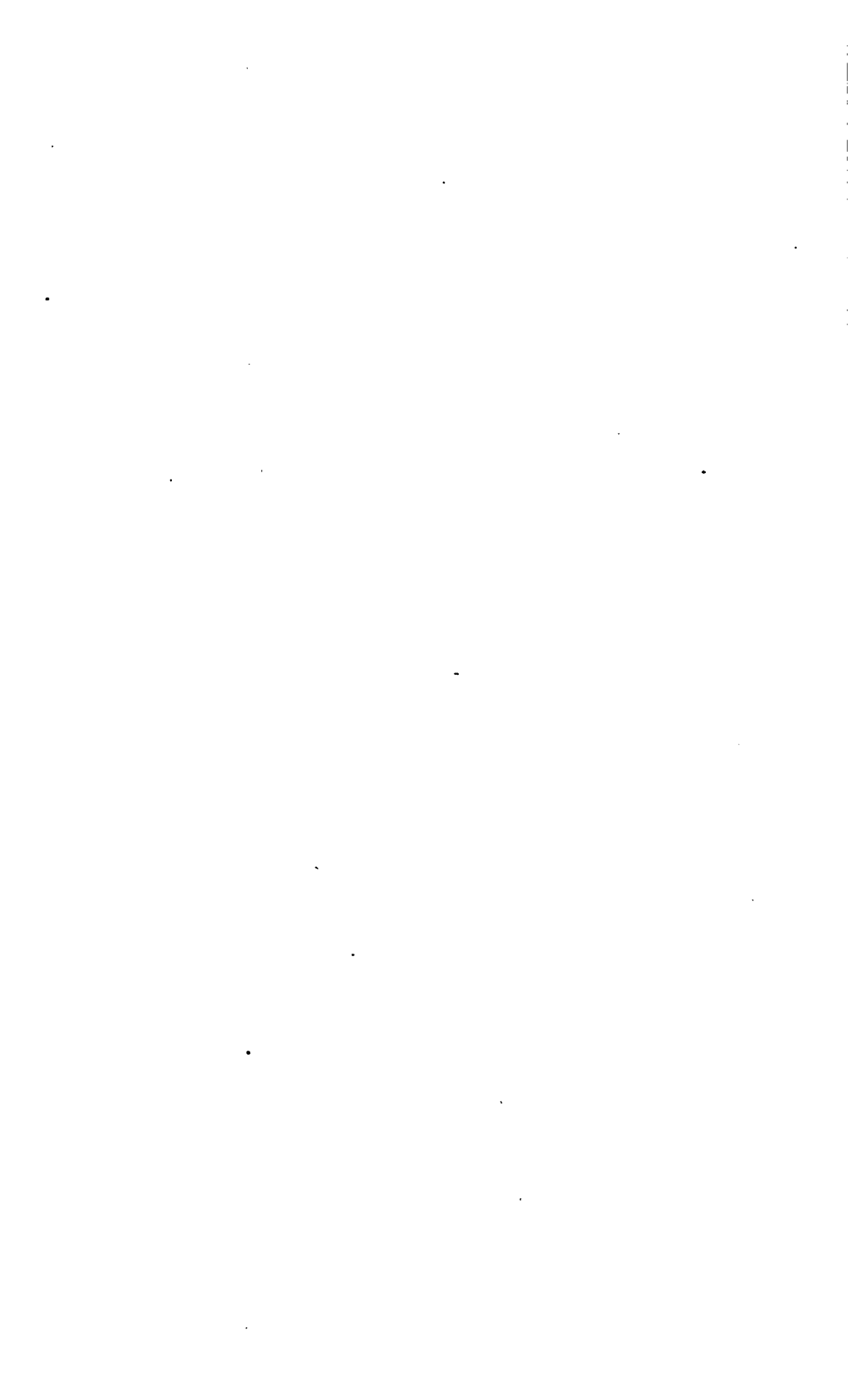
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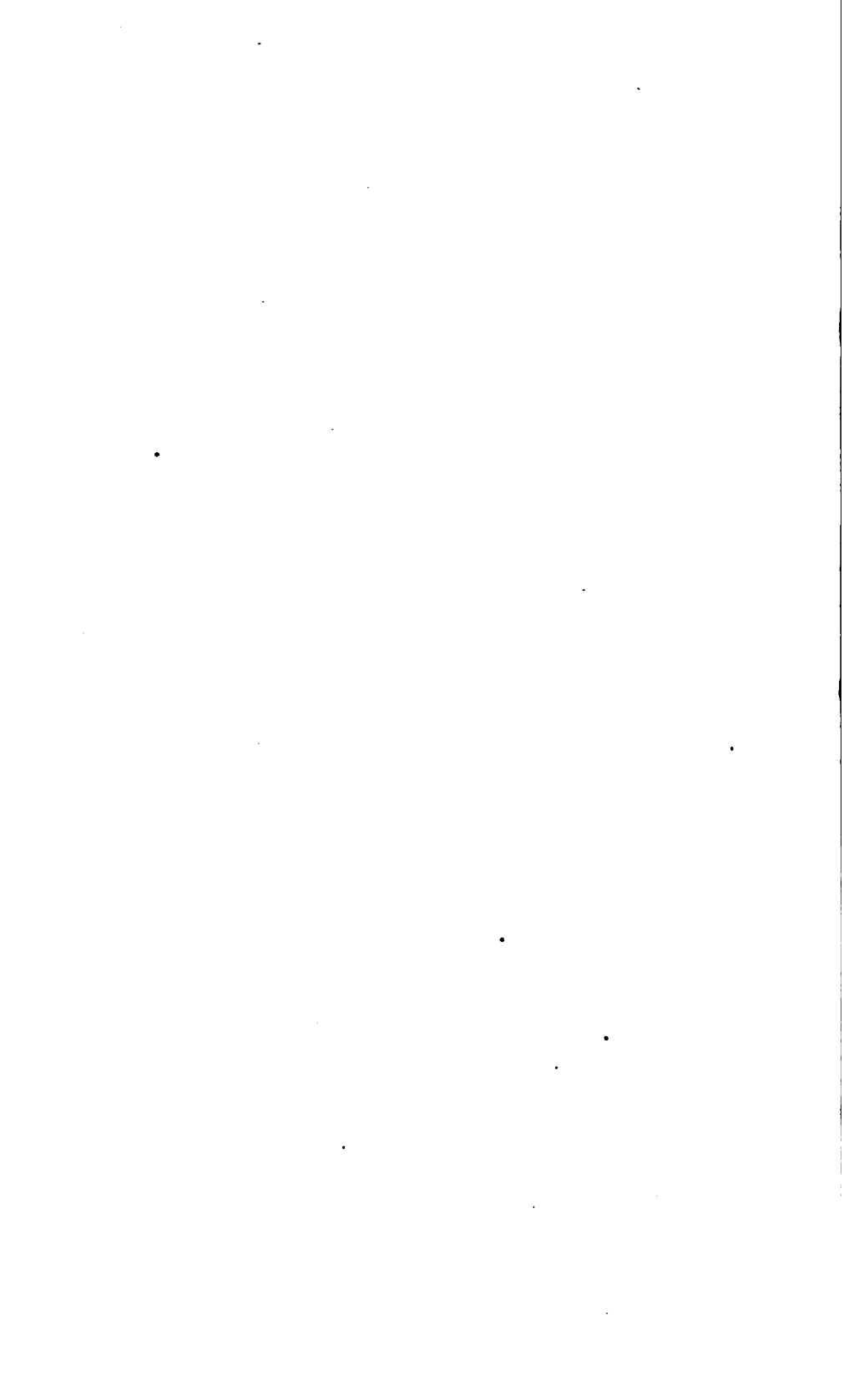
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